Office Supreme Court U. S.
FILED.
JAN 30 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1892.

No. 1128.

CHARLES McINTIRE, JR., ADMINISTRATOR OF CHARLES McINTIRE, DECEASED,
Plaintiff in Error,

v.

EDWIN A. McINTIRE ET AL.,
Defendants in Error.

Error to the Supreme Court of the District of Columbia.

ON MOTION TO DISMISS WRIT OF ERROR.

MOTION AND RECORD.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

On this 25th day of July, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared Oscar Luckett before me, the subscriber, John R. Young, clerk supreme court D. C., and makes oath that he delivered a true copy of the within citation to Saul S. Henkle, counsel in the within-described case, for Edwin A. McIntire, Martha McIntire, Emma T. McIntire, Elizabeth McIntire Test, and Sarah McIntire, assignee of Adaline McIntire.

OSCAR LUCKETT.

Sworn to and subscribed the 25 day of July, A. D. 1892.

J. R. YOUNG, *Clerk.*

I think the pl'ffs in error are entitled to the writ of error now, though it will not operate as a supersedeas on the judg't until bond is executed & approved.

JOHN M. HARLAN.

Endorsed on cover: Case No. 15,098. District of Columbia supreme court. Term No., 142. Charles McIntire, Jr., administrator of Charles McIntire, deceased, plaintiff in error, *vs.* Edwin A. McIntire, Martha McIntire, *et al.* Filed August 8th, 1892.

Office Supreme Court U. S.
FILED.
JAN 30 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1892.

No. 1128.

CHARLES McINTIRE, JR., ADMINISTRATOR OF CHARLES McINTIRE, DECEASED,
Plaintiff in Error,

v.

EDWIN A. McINTIRE ET AL.,
Defendants in Error.

Error to the Supreme Court of the District of Columbia.

ON MOTION TO DISMISS WRIT OF ERROR.

MOTION AND RECORD.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES McINTIRE, ADMINISTRATOR OF CHARLES McINTIRE, DECEASED, PLAINTIFF IN ERROR,	
v.	*No.* 1125.
EDWIN A. McINTIRE ET AL., DEFENDANTS IN ERROR.	

Writ of Error to the Supreme Court of the District of Columbia.

Motion to Dismiss the Writ of Error.

Now come the defendants in error and move the Court to dismiss the writ of error in this case, because this Court has no jurisdiction to entertain the same, for the reasons—

1st. That the order of the supreme court of the District of Columbia which is sought to be reviewed was not a *final judgment* of said court.

2d. That the said order was not a *judgment at all*, but simply a discretionary *order* of the said court in the enforcement of its own rules of practice.

S. S. HENKLE,
Counsel for Defts. in Error.

RECORD.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

CHARLES MCINTIRE, JR., Administrator of CHARLES MCINTIRE, Deceased,
v.
EDWIN A. MCINTIRE, MARTHA MCINTIRE, EMMA T. MCINTIRE, ELIZABETH MCINTIRE, Test., and SARAH MCINTIRE, Assignee of Adaline McIntire.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had in the above-entitled cause, to wit:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
SITTING IN GENERAL TERM.

In re estate of
DAVID MCINTIRE, Deceased.

The caveatees come and move the court to dismiss the appeal in this cause from the judgment of the special term of this court sitting as an orphan's court, on the 9th day of February, 1891, admitting the will of David McIntire to probate and record upon the following grounds, viz:

1. That no appeal was taken in open court and entered on the minutes, or "entered in writing in the clerk's office," as required by Rule No. 89 of this court.

2. That the said judgment was entered in the orphan's court on the 9th day of February, 1891, and the pretended appeal was not entered upon the calendar of this court until the 26th day of June, 1892, and was then entered by the clerk at the instance and request of the counsel for caveator and without the knowledge or order of the court.

3. That no printed record has been filed as required by Rule No. 90 of this court.

And upon other good and sufficient grounds.

S. S. HENKLE,
Counsel for Caveatees.

Filed June 29, 1892.
J. R. YOUNG,
Clerk.

ANSWER OF THE CAVEATOR.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.
IN GENERAL TERM.

No. 1532 *Administration Docket, Register of Wills' Office.*

In re estate of
DAVID MCINTIRE.

1. Caveator admits that no appeal was taken in open court from the said decree and entered on the minutes, but he avers that such was not necessary under the rule, as Rule 89 provides in the alternative that the appeal shall be taken in open court and entered on the minutes or entered in writing in the clerk's office. Respondent shows further that the said appeal was entered in writing in the clerk's office because he says that the formal appeal in writing was made and signed by the caveator, by his counsel of record, and filed with the register of wills on the 12th day of February, 1891, and that the same was received by the register and filed among the papers in said cause, and entered by him in his record of proceedings among the entries in said docket. Respondent further says that the said order appealed from was entered in a case entitled "The estate of David McIntire, No. 1532 of the administration dockets of the register of wills' office," and pending solely before the special term for orphan's court business, and having relation exclusively to the jurisdiction of said special term, the same being a proceeding for the probate of an alleged will of David McIntire and the issuance of

letters of administration c. t. a., and the settlement of his said estate, and respondent says that it was the duty of the register of wills to receive and file and enter all papers, orders, and decrees of the said special term, and not the business of the clerk of this court to receive the same, and that for the purpose of filing, entering, and recording such papers, orders, and decrees and proceedings the said register of wills is by law the clerk of said court. It is provided by section 929, Revised Statutes of the District of Columbia, among other things, that the register of wills shall perform all the duties which were exercised and performed by the register of wills of the orphan's court in the State of Maryland prior to the 27th day of February, 1801. And by section 930 it is provided, among other things, that the register of wills shall "record the decrees and orders of the justice of the supreme court holding the special term for orphan's court business for the District, and all wills proved before him or the court and all other matters directed to be recorded in the court or office of the register."

By section 9 of sub chapter 15 of the act of the assembly of Maryland of 1798, chapter 101, it is provided, among other things, that the register of wills shall make full and fair entries of the proceedings of the orphan's court and of all other matters by law directed to be recorded in the said court or in his office, "and shall in every respect act under their control and direction, as a clerk of a court of law is under the direction of the said court of law."

Counsel are informed by the clerk of this court that it has been the uniform practice of that office to decline to enter, record, file, or receive any order, minute, record, or proceeding or matter or thing appertaining to the special term for orphan's court business, save in the trial of issues filed in the clerk's office and tried at the circuit court, and that there is no docket in the clerk's office for the entering of any such paper, and no receptacle, place, or depository of any sort for the safe-keeping of any such papers, and that none now are or have been on deposit in the clerk's office, or received or entered by the clerk of this court, and that had the written appeal of the caveator in this

case been presented to the said clerk's office to be there filed and entered the said clerk would have refused to receive the same and would have made no entry thereof.

Respondent further says that the provision of the said rule has been complied with by entering the appeal in writing with the register of wills, the only officer of this court required or authorized by law to receive the same.

2d. It is true that the appeal referred to was not entered upon the calendar of the general term until the 25th day of June, 1892, and was then entered by the clerk at the request of counsel for the caveator, but it is respectfully represented that it is the duty of the clerk and not of the counsel or parties to calendar causes in the general term; that there is no rule of this court requiring counsel or parties to do any act with respect to the calendaring of the same, and that the caveatees could have had the said appeal calendared at the April term, commencing on the 1st Monday of April, 1891, had they desired so to do, either to speed the cause or for any other purpose, and that the failure to calendar the same was not due to any design or neglect on the part of the respondent or his counsel, but is a matter resting wholly with the clerk of the court, whose sole duty it is to calendar appeals to the general term, even the register of wills having no duty, so far as counsel are advised, to apprise the clerk of the existence of appeals in his office.

Third. It is true that no printed record has been filed in this cause, but it is respectfully submitted that as counsel did not intend to argue the appeal before the court because of the fact that the order of the special term for orphan's court business appealed from was in strict accordance with the judgment already entered in the general term, and that the judgment was entered in the special term, and the appeal taken therefrom purely as formal necessities, the court will recognize that it would be an idle and useless expense to print a record when the said appeal is not to be argued or considered by the court, it raising precisely the same questions as have been already argued and determined at the former hearing, and counsel regard the case as being distinctly within the provisions

of section 5 of the 90th Rule, which provides that the court may, for sufficient cause shown, by special order, dispense with the printing, which application is now made for the reasons above stated.

If it be the desire of the court to have the said cause argued before it, the caveator, by his counsel, tenders himself ready to have a printed record and brief, filed within five days, and to reargue the said cause at any date which the court may designate.

CALDERON CARLISLE,
WM. G. JOHNSON,
For Caveator.

JUNE 29TH, '92.

IN THE GENERAL TERM.

McINTIRE
v.
McINTIRE.

In the Appeal from the Decree of the Supreme Court holding a term for Orphan's Court business.

This cause having been submitted to the court by the caveator upon the appeal from the order passed at the special term for orphan's court business February 9, 1891, and the caveatees having moved to dismiss said appeal, it is by the court in general term, this 16th day of July, 1892, upon consideration thereof, ordered that the said appeal be, and the same is hereby, dismissed.

By the court.

A. B. HAGNER,
Asso. Justice.

McINTIRE
v.
McINTIRE.
No. 1538, *Adm. Docket.*

An application having been made this day to me in chambers to sign a citation in aid of a writ of error directed to be issued by an order of the attorney of Charles McIntire, and to fix the penalty of a supersedeas bond

therefor and approve the same in this case, said writ being designed to procure a review of an order of the general term dismissing an appeal from the orphan's court herein, and it appearing to me that this is not a proper case for such action on my part, it is hereby certified that I decline to sign said citation and to fix and approve the penalty of such supersedeas bond.

Witness my hand this 18th day of July, 1892.

A. B. HAGNER,
Asso. Justice, Supreme Court, D. C.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, between Charles McIntire, Jr., administrator of Charles McIntire, deceased, and Edwin A. McIntire, Martha McIntire, Emma T. McIntire, Elizabeth McIntire, test., and Sarah McIntire, assignee of Adaline McIntire, a manifest error hath happened, to the great damage of the said Charles McIntire, Jr., administrator of Charles McIntire, deceased, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief-Justice

of the said Supreme Court, the 23d day of July, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] (Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed this July 23d, 1892, but to operate as a supersedeas only upon the execution by the plaintiff in error, within ten days from this date, of a bond in the penalty of five thousand dollars, conditioned as required by law in cases of supersedeas.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Rule No. 90.

(1.) In all law cases before the general term, the appellant or party bringing the case up shall cause such portions of the record to be printed as will present the points to be reviewed.

(2.) In all appeals from final decrees rendered at special term, and all cases ordered to the general term to be there heard in the first instance, the appellant or plaintiff shall cause to be printed an abstract of the pleadings, not to exceed one-fourth of the number of folios in the original pleadings; and in all other equity appeals, and all other motions and proceedings ordered to the general term to be there heard in the first instance, whether at law or in equity, the appellant or party making the motion, or instituting the proceeding ordered up, shall cause to be printed such portions of the record as will present the points to be reviewed or considered.

(3.) Ten printed copies of all papers hereinbefore required to be printed shall be filed in the clerk's office, for the use of the counsel and the court, before the first day of the term on the calendar of which the case is entered,

and the costs of such printing shall be taxed as costs in the case against the losing party.

(4.) In every case in the general term the counsel for the party having the affirmative shall, at least six days before the case is called for argument, file with the clerk ten copies of a printed brief containing a statement of the case, and the points of law and fact to be argued, with a reference to the authority to be relied on. The counsel for the opposite party shall file a brief of a similar character, omitting, at his option, a statement of the case at least three days before the case is called for argument. Two of the briefs so filed on either side shall be for the use of the opposite party.

(5.) If the provisions of this rule in regard to printing are not complied with, the court may, on motion, order the case to be dismissed or otherwise disposed of; but the court or any justice thereof may, for sufficient cause shown, by special order, dispense with the application of this rule in any particular case upon motion and due notice thereof to the opposite party.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing is a true copy of the motion filed by the caveatees, June 29, 1892, to dismiss the appeal taken from the judgment of the special term of this court sitting as an orphan's court, on the 9th day of February, 1891, admitting the will of David McIntire to probate, together with all subsequent proceedings up to and including the writ of error allowed by Justice John M. Harlan of the Supreme Court of the United States, July 23, 1892, as the same remains upon the files and records of this court; also a true copy of sections 1 to 5, inclusive, of rule No. 90 of the rules of practice of the court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 7th day of December, A. D. 1892.

[SEAL.] JOHN R. YOUNG,
Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,

IN GENERAL TERM, JULY 15, 1892

The Chief-Justice, Justices Hagner and James sitting.

McINTIRE *vs.* McINTIRE. } *Issues from Orphan's Court. No.* 1532.

Opinion by Mr. Justice Hagner.

A few days ago an oral motion was made here by the counsel for the caveator in the case of McIntire *vs.* McIntire, that this court would *pro forma* affirm a decree of the orphan's court admitting the will of David McIntire to probate in order that an appeal might be taken to the Supreme Court of the United States from that decree.

Notice had been given counsel for the caveatees, and he appeared and made objection; and upon our suggestion the matter was presented to us by the caveator in writing, accompanied by a motion in writing on the part of the caveatees that the alleged appeal of the caveator should be dismissed. This motion was based upon several grounds, and a reply was made by the caveator resisting the motion, and argument was addressed to us by the respective counsel.

The facts are that in 1884 issues were sent from the orphan's court to the circuit court and there tried before a jury, and a verdict found for the caveatees substantially sustaining the will; but owing to the imperfect form of the issues there was such manifest inconsistency in the verdict that I, who was the justice holding the circuit court, was obliged to grant a new trial; an appeal was taken to this court, where the rulings of the court below were sustained. It was then tried again in the circuit court, before the chief-justice, and a verdict again rendered sustaining the will. On appeal from the rulings at the trial, the case was heard here, before Justices Cox, James, and Bradley, and the rulings below affirmed, the opinion being delivered by Mr. Justice Cox. The counsel for the caveatees took the record of the case down to the orphan's court, and moved to have the will admitted to probate. On objec-

tion by counsel for the caveator, Mr. Justice Bradley, presiding in that court, prepared a careful decree, which, after reciting at some length the proceedings, admitted the will to probate on the 9th of February, 1891. On the 12th of that month a paper was filed in the orphan's court by the caveator's counsel appealing from that decree. Nothing further was done about the case in that court and no entry of any description was made in the clerk's office until the 29th of June, 1892. The 12th of February, 1891, fell in the January term of the general term. Its April term and October term of that year and the January term and April term, 1892, passed without any notice of that order, and it was not until the latter part of June, 1892 (which was near the end of the fourth term after the order), that a direction was given by the counsel for the caveator (without previous application to the court) to our clerk to enter the appeal on the June calendar of this court. We knew nothing of this order until July, when the motion was made that we should enter the *pro forma* decree as before stated.

Between the order given in the orphan's court and the counsel's direction to our clerk to enter the appeal on our June calendar there was an interval of more than a year and four months.

The caveatees' motion is based upon several grounds. The first is that there never was any appeal taken in the sense of the rules of our court. Rule 89 provides that "no order, judgment, or decree of any of the courts held by a single justice shall be reviewed in the general term unless the appeal shall be taken and perfected within twenty days, Sundays excluded, after the order, judgment, or decree complained of shall have been made or pronounced; and no appeal shall be considered as taken and perfected unless taken in open court and entered on the minutes, or entered in writing in the clerk's office."

No appeal was taken "in open court," unless the order in the orphan's court is to be so considered, and no order in writing was ever filed in the clerk's office. But it is insisted by the counsel for the caveator that the register of wills was the clerk of the court for the purpose of enter-

ing the appeal, and the orphan's court was "the court," and that the result is precisely the same as if all these steps had been taken in the clerk's office.

My brother James and myself do not give our assent to these propositions. These rules were prepared before the passage of the act of 1870, which introduced the orphan's court as a part of our court system. Clearly, before that time these rules referred to the office of our clerk and to courts other than the orphan's court, and we think they should still be construed as applying to the office of the clerk of this court and not to the office of the register of wills. Suitors are not expected to go to the register's office and to look whether appeals have been perfected any more than to a special appeal docket in an admiralty case in the District court.

I am informed by the register of wills that the practice has been for the counsel and not the register to send up the appeals.

Rule 90, sec. 1, as established in 1888, provided that—

"In all law cases before the general term the appellant or party bringing the case up should cause such portions of the record to be printed as will present the points to be reviewed."

Section 2 declared that "in all appeals from final decrees rendered at special term, and in all cases ordered to the general term to be there heard in the first instance, the appellant or plaintiff shall cause to be printed an abstract of the pleadings, and in all other equity appeals and all other motions and proceedings ordered to the general term to be heard in the first instance, the appellant or party making the motion or instituting the proceedings ordered up should cause to be printed such portions of the record as will present the points to be reviewed or considered."

By section 3 "ten printed copies of all papers required to be printed shall be filed in the clerk's office before the first day of the term on the calendar of which the case is entered, and the costs of such printing shall be taxed as costs in the case against the losing party."

These provisions are positive enough in their terms, but

the court had found such great inconvenience to the public and suitors in not having them complied with that it passed a rule recently (February 15th last) which reads as follows: "In every case in the general term the counsel for the party having the affirmative shall, at least six days before the case is called for argument, file with the clerk ten copies of a printed brief containing a statement of the case and the points of law and fact to be argued, with a reference to the authority to be relied on," &c. Then another section provides "that if the provisions of this rule in regard to printing are not complied with, the court may, on motion, order the case to be dismissed or otherwise disposed of; but the court or any justice thereof may, for sufficient cause shown, by special order, dispense with the application of this rule in any particular case upon motion and due notice thereof to the opposite party."

Now, one of the grounds on which the caveatees move to dismiss is that this printing required by the present rules has not been done, as is admitted is the fact; it is also admitted the appeal was not entered, except in the register's office, and that nothing was done in this court until the 29th day of June last. Counsel for the caveator contend in reply that the printing is not necessary, and that they had a right to enter the appeal on our calendar, without application for leave, whenever they might see fit.

As to the printing, counsel say they did not consider it worth while to have that done, because the case had been heard before and the same record would serve, but they state they are now ready to have it done if it is required by the court.

Now, are these reasons sufficient to justify the court in annulling the rule so soon after its adoption? We do not think so.

We think the liberality hitherto shown by the court and its indisposition to compel their enforcement has done great harm, and we can see in this case no meritorious reason why the rule should be laid aside. Every judge in this court, except one, has sat in this case; the opinion of Mr. Justice Cox in the general term, which was a very clear one, sustained the judgment of the circuit court, and every jus-

tice who has had anything to do with it seems to be of the opinion that there is no merit in the case. We are told that some of the parties caveatees are very old. This case has been litigated for years, and if the case goes to the Supreme Court there would be three years more of delay. We think the caveator was not diligent, and a majority of the court is of opinion that this rule should be held to mean what it says, and therefore we think we ought not to grant the motion of the caveator, which will therefore be dismissed, and the motion of the caveatees to dismiss the appeal is allowed.

The foregoing has been submitted to me for examination. What was said at the time had not been committed to writing, but the above embodies the points of that decision, the only difference between this and what was then said being merely verbal corrections made by myself.

A. B. HAGNER.

FILED
JAN 30 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1892.

No. 1128.

CHARLES McINTIRE, JR., ADMINISTRATOR OF CHARLES McINTIRE, DECEASED,
Plaintiff in Error,

v.

EDWIN A. McINTIRE ET AL.,
Defendants in Error.

Error to the Supreme Court of the District of Columbia.

ON MOTION TO DISMISS WRIT OF ERROR.

BRIEF OF S. S. HENKLE,

Counsel for Defendants in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES McINTIRE, JR., ADMINISTRATOR OF CHARLES McINTIRE, DECEASED, PLAINTIFF IN ERROR,

v.

EDWIN A. McINTIRE, ET AL., DEFENDANTS IN ERROR.

No. 1128.

On Motion to Dismiss the Writ of Error.

Brief of S. S. Henkle, Counsel for Defendants in Error.

STATEMENT OF THE CASE.

The will of David McIntire, who died, testate, in the city of Washington April 1, 1884, was admitted to record in the supreme court of the District of Columbia April 8, 1884, but was subsequently contested by Charles McIntire, a brother of the testator, who having died pending the suit, his administrator was admitted as a party in his stead. The case had been tried to a jury and a verdict sustaining the will had been rendered under the di-

rection of the court; a motion for a new trial refused, exceptions had been overruled, and an appeal was taken to the general term by the caveator. The judgment of the special term was affirmed, and, the verdict of the jury having been duly certified to the special term for probate business, a judgment admitting the will to record and probate was afterwards entered in the special term for probate business on February 9, 1891.

On the 12th day of February, 1891, the caveator filed in the office of the register of wills a notice of appeal to the general term. Nothing was done further until the — day of June, 1892, when the counsel for the caveator requested the assistant clerk of the supreme court of the District of Columbia to docket the case on the calendar of the general term, the said general term being then in session, which the said clerk did. The leave of the court was not asked, nor did the court know the case had been placed on the calendar until afterwards.

No record of the case was filed, either printed or in manuscript, and nothing was filed or was done in the general term save that the name of the case was entered by the clerk as aforesaid upon the calendar thereof.

The counsel for the caveator then notified the counsel for the caveatees that on Monday, the 27th day of June, 1892, they would call the attention of the court to the case, and would submit to an affirmance of the final judgment of the orphan's court of February 9, 1891, admitting the will to probate, in order to prosecute an appeal to the Supreme Court of the United States. On the day indicated in the notice counsel for both parties appeared before the court. Counsel for the caveator orally stated his motion, and the counsel for the caveatees objected to its consideration for the reason that the case was not properly before the court, the appeal not having been

properly taken and no record having been filed and printed as required by the rules of the court, and thereupon the court gave counsel for the caveatees leave to file a motion to dismiss the appeal. The motion to dismiss the appeal from the special term in record was then filed.

Counsel for the caveator filed their answer to the said motion, and the case came on for hearing upon the said motion and answer on the 15th day of July, 1892, and was argued by counsel. The court sustained the motion of the caveatees, and on the 16th day of July, 1892, made the order dismissing the appeal found in the record.

The opinion of the court by Mr. Justice Hagner is found in the record.

Afterwards, on the 18th day of July, 1892, counsel for the caveator appeared before Mr. Justice Hagner and prayed him to sign a citation and fix the amount of a supersedeas bond for the purpose of prosecuting a writ of error to the Supreme Court of the United States from the said order of the general term of July 16, 1892, dismissing said appeal, which application was refused by Mr. Justice Hagner, and his order in writing refusing said application is found in the record.

And there were no further or other proceedings in said matter in the said supreme court of the District of Columbia, or by or before any justice of said court.

Counsel for the caveator then applied to Mr. Justice Harlan of the Supreme Court of the United States for the allowance of a writ of error from the said order of the general term of the supreme court of the District of Columbia of the 16th day of July, 1892, which, on the 23d day of July, 1892, was allowed by the said justice upon the caveator's entering into a supersedeas bond in the sum of $5,000. The bond was given and approved and the writ of error was issued, and the said appeal was docketed in this Court on the day of , 1892.

As Mr. Justice Harlan delivered no opinion, I do not know upon what ground the writ of error was allowed, but presume it was to give the plaintiff in error the opportunity of having the full Court pass upon his right to have the order of July 16, 1892, reviewed here.

ARGUMENT.

The writ of error in this case is to the order of the supreme court of the District of Columbia sitting in general term, July 16, 1892.

This is simply an order of the court dismissing an appeal from the special term for orphan's court business to the general term because of the failure of the appellant to comply with Rule No. 90 of the law rules of the court, requiring ten copies of the printed record to be filed in the general term on or before the first day of the term at which the case is calendared.

Was this a final judgment upon which a writ of error might be prosecuted to this Court?

By sec. 705 of the Revised Statutes of 1878 it was provided:

"The *final* judgment or decree of the supreme court of the District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of one thousand dollars may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court."

By the 4th section of the act of February 25, 1879 (20 Stats. at L. 320), the foregoing provision was re-enacted, save that the jurisdictional amount was raised to twenty-five hundred dollars.

By the act of March 2, 1885 (23 Stats. 443), it is provided:

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute exceeds in value the sum of five thousand dollars."

It will be observed that the adjective "final" preceding judgment is omitted from this act, but it is manifest that the purpose of the act was simply to raise the jurisdictional amount for writ of error or appeal to five thousand dollars, and there was no purpose to alter the requirements of all the preceding legislation providing for writs of error and appeals from the old circuit court, and subsequently from the supreme court of the District of Columbia, from the original act of February 27, 1801, down to 1885, that the judgment or decree should be "*final*."

This last act couples the supreme courts of the Territories with the supreme court of the District of Columbia.

It was certainly not intended to enlarge, but to restrict, writs of error and appeals from the District of Columbia and the Territories, and to require the same jurisdictional amount as was required in writs of error and appeals from the circuit courts, and this was the whole scope and intent of the act.

See McLish *v.* Raff, 141 U. S. 662.

Chicago *et al.* R.R. Co. *v.* Roberts, *ibid* 690.

So that under the law regulating writs of error and appeals to this Court from the supreme court of the District of Columbia nothing but *final judgments* and *decrees* can be reviewed here.

Since the Revised Statutes of 1878, writs of error and appeals from the supreme court of the District of Columbia have been placed upon the same basis precisely, so far as this is concerned, as writs of error and appeals from the circuit courts.

In the act of February 27, 1801 (2 Stats at L., p. 103), *supra*, writs of error and appeals were authorized from the circuit court of the District of Columbia from "final judgments, *orders*, or decrees."

And this provision was continued through all the subsequent legislation relating to writs of error and appeals from the circuit court and its successor, the supreme court of the District of Columbia, down to the Revised Statutes of 1878, when the word "*orders*" was omitted and writs of error and appeals were allowed only from "*final judgments* and *decrees*."

WAS, THEN, THE ORDER OF JULY 16, 1892, TO WHICH THIS WRIT OF ERROR WAS ALLOWED, A FINAL JUDGMENT? IF NOT, THIS COURT HAS NO JURISDICTION OF IT.

Freeman defines a judgment to be—

"The decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record, as the conclusion of the law upon facts found by the court or jury or admitted by the parties."

See Freeman on Judgments, p.

I believe this definition is generally accepted by the profession and the courts as correct.

Apply this definition to the order of July 11, 1892.

There was no decision or sentence of the law upon the matter contained in the record, for there was no record of the case before the court. The judgment was not "the

conclusion of the law upon the facts found by the court or admitted by the parties."

There was no question of law involved or to be decided, but simply the exercise of the discretion of the court as to whether the appellant should be excused from the application of a rule of the court or not.

It was the simplest possible form of the exercise of discretion on the part of the court. For the determination of it, it was not even necessary that the court should have known what the litigation was about. The Rule 90 requires ten printed copies of the record to be filed on the first day of the term at which the appeal is calendared; or upon failure to do so the court *may*, on motion, dismiss the appeal. No printed records—no records, printed or written—were filed, and the appellee moved to dismiss the appeal, and it was so ordered by the court.

The rule is not mandatory that the appeal *shall* be dismissed, but *may*. The court may dismiss or not, as it chooses, and for any reason, or without any reason save that the rule has not been complied with.

Clearly this was no judgment at all, but simply a discretionary order.

Abbott defines an order:

"In practice of the courts *an order* is the formal paper embodying any direction of a court or a judge *other than a judgment or decree*, and made to be entered of record as one of the proceedings in a cause."

See vol. 2 Abbott's Law Dictionary, 215.

This order of July 16, 1892, is precisely within the definition of Abbott. It was neither a *judgment* nor a *decree*, but was a direction of the Court to be entered of record as one of the proceedings in the cause.

BUT IN ORDER TO GIVE JURISDICTION TO THIS COURT THERE MUST NOT ONLY BE A JUDGMENT, BUT A FINAL JUDGMENT.

This Court has many times passed upon what constitutes a *final* judgment or decree in order to give it jurisdiction by writ of error or appeal.

In Boswick *v.* Binkerhoff, (106 U. S. 3) said this Court:

"The rule is well settled and of long standing, that a judgment or decree to be *final* within the meaning of that term as used in the acts of Congress giving this Court jurisdiction on appeal and writs of error, *must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here the Court below would have nothing to do but to execute the judgment or decree it had already rendered.*" "Consequently, if the judgment is not one which disposes of the whole case on the merits, it is not final."

For this doctrine Chief-Justice Waite cites Whiting *v.* Bank of the United States (13 Pet. 1); Forgay *v.* Conrad (6 How. 201); Craighead *v.* Wilson (18 *id.* 199); Beebe *v.* Russell (19 *id.* 283); Bronson *v.* Railroad Co. (2 Black. 524); Thomson *v.* Dean (7 Wall. 342); St. Clair County *v.* Livingston (18 Wall. 628); Parcels *v.* Johnson (20 *id.* 653); Railroad Co. *v.* Swasey (23 *id.* 405); Crosby *v.* Buchanan (*id.* 420); Commissioners *v.* Lucas (93 U. S. 108).

St. L., I. M. & S. R.R. Co. *v.* Southern Express Co. (108 U. S.), at 28, said Chief-Justice Waite:

"*A decree is final for the purpose of appeal to this Court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.*"

The same is repeated in *Ex parte* Norton, *id.*, at 242.

Mower *v.* Fletcher (114 U. S.) at 128:

"That judgment is final for the purposes of a writ of error to this Court which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment already rendered."

McLish *v.* Roff, 141 U. S. at 665.

I might indefinitely extend the list of cases in this Court in which it has been held that in order to constitute a *final judgment* to give jurisdiction to this Court upon writ of error the judgment below must *finally dispose of the case upon the merits.*

It will scarcely be claimed by anybody that the order of July 16, 1892, dismissing the appeal in this case was a *final judgment* disposing of the case upon *the merits, as the merits were in no way before the court.*

I might safely, I think, rest the case here, but another absolutely fatal objection to the writ of error is that the *order* of July 16, 1892, to which the writ is taken, was a *purely discretionary order and cannot be reviewed by any court.*

THIS COURT HAS DECIDED IN ALMOST INNUMERABLE CASES THAT NEITHER A WRIT OF ERROR NOR APPEAL WILL LIE TO A JUDGMENT OR DECREE BASED UPON THE DISCRETION OF THE COURT BELOW.

The following are some of the many:

A writ of error does not lie from an order allowing or refusing a motion for a new trial.

United States *v.* Daniel, 6 Wheat. at 547.

Arkansas Cattle Co. *v.* Mann, 130 U. S. at 75, citing Parsons *v.* Bedford, 3 Pet. 433, 447; Insurance Co. *v.* Folsom, 18 Wall. 237, 248; Railroad Co. *v.* Traloff, 100 U. S. 24, 31.

A question depending upon the discretion of the circuit court cannot be certified to this Court for decision.

Packer *et al. v.* Nixon, admr., 10 Pet. at 410.
Smith, Lessee, *v.* Vaughn, 10 Pet. 366.
Davis, admx., *v.* Borden, 10 Pet. 286.
Wiggins *v.* Gray, 24 How. at 306.

Error will not lie to an order granting or refusing an amendment of a pleading, because it is discretionary with the court.

Ayres *v.* Watson, 137 U. S. 584.
Gormley *v.* Bunyan, 138 U. S. at 630.

The first assignment of error in this case was that the court erred in refusing to allow the plaintiff in error to file certain pleas.

Says this Court:

"The reply to this is that as long ago as Mandeville *v.* Wilson (5 Cr. 15, 17), and as late as Chapman *v.* Barney (129 U. S. 677), it has been held that the granting or refusal of leave to file an additional plea, or to amend one already filed, is discretionary with the court below, and not reviewable by this Court, except in a case of gross abuse of discretion."

Bullitt County *v.* Washer, 130 U. S. at 145.
Chapman *v.* Barney, 129 U. S. 667.

Rehearing.

"The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not a subject of appeal."

Roemer *v.* Bernheim, 132 U. S. 106.

Many other cases might be cited in which it has been

held by this Court that discretionary judgments and decrees of the circuit courts were not reviewable here.

In Wiggins *v.* Gray (24 Howard), at 306, *supra*, Chief-Justice Taney said:

"*And it has repeatedly been held that the decision of the inferior court upon a question depending upon the exercise of a sound judicial discretion in a matter of practice, as to the mere form of proceeding, is not open to revision in this Court.*"

The case at bar is precisely within the description of the class of cases referred to by Chief-Justice Taney in the foregoing citation, and many similar decisions have been made since his day.

Indeed I should not have thought it necessary to cite any authorities at all but for the fact that the writ of error was allowed by Mr. Justice Harlan, for whose learning and ability as a jurist I have the highest regard.

His Honor delivered no opinion, and hence I have no intimation as to what influenced him in the allowance of the writ of error after it had been refused by Mr. Justice Hagner of the supreme court of the District of Columbia, who delivered the opinion of the general term dismissing the appeal.

It seems to me that if the order of July 16, 1892, was not a *purely discretionary order*, there can be no such thing, and that any order made in a cause under the rules of the court which may have the effect to put a party out of court may be brought here upon writ of error or appeal. For example,—

Law Rule No. 86 provides that where the plaintiff is a non-resident when he brings his suit or becomes non-resident during the pendency thereof the defendant may lay a rule upon him to give security for costs, and if he fails to comply judgment of non-suit shall be entered.

Would anybody claim that a judgment of non-suit under this rule would be such a *final judgment* as would give jurisdiction to this Court upon a writ of error?

Most certainly not.

The same rule provides "that if the rule be laid at the trial term the court may, in its discretion, on the plaintiff's motion, continue the case until the next term."

Suppose the rule is laid at the trial term and the court refuses to allow a continuance and enters judgment of non-suit, could error be predicated of this judgment? Certainly not.

And yet the judgment may operate as a *final* judgment. The statute of limitation may interpose and bar another suit.

Rule 69 provides that if a defendant served with copies of the declaration, notice to plead, and summons fail to appear and plead according to notice, a judgment by default for non-appearance may be entered against him at the appearance term by the circuit court, or at a special term, which judgment may be set aside during the said appearance term, or within the first four days of the next trial term, upon the defendant's offering a plea, verified by his affidavit, setting up a defence *considered by the justice sufficient, if proved*, to bar the action in whole or in part."

Suppose a judgment by default for non-appearance is taken under this rule, and the defendant comes in within the appearance term or within the first four days of the trial term and presents his plea, verified by his affidavit, and moves the court to set aside the judgment, which the court refuses to do. Will anybody claim that error might be predicated of this judgment or of the overruling of the motion to set it aside? Yet it is to all intents and purposes a final judgment.

A case is called for trial; the plaintiff moves for a continuance upon the ground of the absence of a material witness, without whose testimony he cannot prove his case; the court overrules his motion and orders the trial to proceed; for want of the testimony of the absent witness the plaintiff loses his case and judgment goes against him.

Will anybody claim that the refusal of the court to allow the continuance to enable the plaintiff to get his witness is ground of error in the judgment?

Similar examples showing that judgments and orders of inferior courts in enforcing or relaxing their own rules made for the regulation of their own practice are and must of necessity be within their own discretion, and that such judgments and orders are not subject to review in a court of errors or appeals, might be indefinitely multiplied.

It seems to me that this is a dangerous door to open, for if it be understood that such orders as the one with which we are now dealing are subject to review on appeal or upon writs of error, this Court will soon be inundated with such cases.

The record accompanying this brief and motion contains all the record there was before the court in general term when and upon which it made the order of July 16, 1892, dismissing the appeal from the special to the general term, and of course no other or additional record has any business here or can be considered by this Court in passing upon the question as to whether that order may be reviewed here. But the clerk of the court below has returned with the writ of error copies of all the papers filed in the orphan's court relating to the administration and settlement of the estate of David McIntire, deceased, commencing with the petition for the grant of letters of administration c. t. a. and embracing every paper, order, or decree of every nature or kind filed or entered during the

Would anybody claim that a judgment of non-suit under this rule would be such a *final judgment* as would give jurisdiction to this Court upon a writ of error?

Most certainly not.

The same rule provides "that if the rule be laid at the trial term the court may, in its discretion, on the plaintiff's motion, continue the case until the next term."

Suppose the rule is laid at the trial term and the court refuses to allow a continuance and enters judgment of non-suit, could error be predicated of this judgment? Certainly not.

And yet the judgment may operate as a *final* judgment. The statute of limitation may interpose and bar another suit.

Rule 69 provides that if a defendant served with copies of the declaration, notice to plead, and summons fail to appear and plead according to notice, a judgment by default for non-appearance may be entered against him at the appearance term by the circuit court, or at a special term, which judgment may be set aside during the said appearance term, or within the first four days of the next trial term, upon the defendant's offering a plea, verified by his affidavit, setting up a defence *considered by the justice sufficient, if proved*, to bar the action in whole or in part."

Suppose a judgment by default for non-appearance is taken under this rule, and the defendant comes in within the appearance term or within the first four days of the trial term and presents his plea, verified by his affidavit, and moves the court to set aside the judgment, which the court refuses to do. Will anybody claim that error might be predicated of this judgment or of the overruling of the motion to set it aside? Yet it is to all intents and purposes a final judgment.

A case is called for trial; the plaintiff moves for a continuance upon the ground of the absence of a material witness, without whose testimony he cannot prove his case; the court overrules his motion and orders the trial to proceed; for want of the testimony of the absent witness the plaintiff loses his case and judgment goes against him.

Will anybody claim that the refusal of the court to allow the continuance to enable the plaintiff to get his witness is ground of error in the judgment?

Similar examples showing that judgments and orders of inferior courts in enforcing or relaxing their own rules made for the regulation of their own practice are and must of necessity be within their own discretion, and that such judgments and orders are not subject to review in a court of errors or appeals, might be indefinitely multiplied.

It seems to me that this is a dangerous door to open, for if it be understood that such orders as the one with which we are now dealing are subject to review on appeal or upon writs of error, this Court will soon be inundated with such cases.

The record accompanying this brief and motion contains all the record there was before the court in general term when and upon which it made the order of July 16, 1892, dismissing the appeal from the special to the general term, and of course no other or additional record has any business here or can be considered by this Court in passing upon the question as to whether that order may be reviewed here. But the clerk of the court below has returned with the writ of error copies of all the papers filed in the orphan's court relating to the administration and settlement of the estate of David McIntire, deceased, commencing with the petition for the grant of letters of administration c. t. a. and embracing every paper, order, or decree of every nature or kind filed or entered during the

progress of the administration, including the administrator's accounts for settlement, the exceptions thereto, the reference of the accounts to the auditor, the testimony taken before him, and his report thereon, the proceedings in a chancery cause wherein the present plaintiff in error, in his individual capacity as a legatee under the will he is now contesting as administrator, and several other parties who claimed to be legatees, but were not so in fact, were complainants against the administrator c. t. a., making four large volumes of type-writing and aggregating about a thousand pages, no part of which save that which accompanies this brief was before the court below when the order of July 16, 1892, was made, and of course could not in any view of the case be considered upon this hearing.

The clerk's estimate for printing this absurd conglomerate of matters having no possible relation to the question at bar was $815.00. As I conceived it would be a waste of money and an imposition upon the court to print this great mass of immaterial rubbish, I have caused a record of what was before the general term, and upon which it acted in making the *order* of July 16, 1892, to be made and certified by the clerk, and have printed that only. If, however, in any possible view of the case this honorable Court shall desire this whole mass of matter to be printed I shall ask leave to print it and renew the motion to dismiss.

S. S. HENKLE,
Counsel for Def'ts in Error.

Office Supreme Court U. S.
FILED.
JAN 7 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES McINTIRE, JR.,
Administrator of Charles McIntire, deceased,
Plaintiff in Error,
vs.
EDWIN A. McINTIRE *et al.*,
Defendants in Error.

No. 1,128.

Brief of Plaintiff in Error in opposition to motion to dismiss Writ of Error.

JEREMIAH M. WILSON,
CALDERON CARLISLE,
WM. G. JOHNSON,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES MCINTIRE, JR., ADMINISTRATOR OF CHARLES MCINTIRE, DECEASED, *Plaintiff in Error,*	
vs.	No. 1,128.
EDWIN A. MCINTIRE ET AL. *Defendants in Error.*	

Brief in Opposition to Motion to Dismiss.

The object of the present motion is to prevent the review by this Court of the final judgment of the Supreme Court of the District of Columbia establishing as the last will and testament of one David McIntire, certain informal unattested, altered and mutilated papers, whereby a personal estate aggregating nearly one hundred thousand dollars is disposed of to collateral kinsmen to the entire exclusion of the one nearest of kin, who was the intestate of the plaintiff in error.

According to the ordinary practice the General Term disposed of all the questions in the case after the second trial of issues, and the final judgment admit-

ting the alleged will to probate was entered in the Special Term for Orphan's Court business in pursuance of the General Term's decision. From this judgment the plaintiff in error appealed a second time to the General Term and offered to submit to a *pro forma* affirmance preparatory to coming to this Court. (See *Ormsby* vs. *Webb*, 134 U. S., p. 47.) To his surprise the General Term refused even to confirm its previous decision, and dismissed his appeal.

It is now contended by the defendant in error that the writ of error brings up only the order dismissing the appeal and that it is not a final judgment reviewable in this Court.

But the position of the plaintiff in error, amply supported by the authority of this Court, is:

First. That the writ of error brings up the whole case and that the litigation being finally ended in the Court below its final disposition of the case if erroneous will be reversed here under whatever form that final disposition may have been made.

Second. That even if the only thing before this Court is the order dismissing the appeal, which order, it cannot be denied, finally disposed of the litigation, that order can be reviewed here, and, if erroneous, will be reversed.

Defendants in error have caused to be printed no part of the transcript, returned to this Court with the writ, but only certain papers certified by the clerk of the court below, some of which do not appear in the transcript. Counsel for plaintiff in

error are obliged, at the outset, to refer to the transcript on file in this Court, by which the following state of the case appears.

The case arose upon a petition for probate of an alleged will (Transcript, p. 1). After some adversary plenary proceedings under the Act of Assembly of Maryland in force in this District (1798 chap. 101, Kilty's Laws of Maryland), issues were framed by the Special term for Orphan's Court business to be tried by a jury (Transcript, p. 90). The defendants in error appealed from this order, but it was affirmed in the General Term (Transcript, p. 95). Thereupon a trial was had resulting in a verdict in favor of the defendants in error as to some issues and against the alleged will as to others (Transcript, p. 104). This verdict was set aside by the trial justice as being inconsistent with itself because of the contradictory findings on the different issues and a new trial was had. Upon the second trial, the trial justice directed a peremptory verdict in favor of the alleged will, stating the following reasons for so doing:

"THE COURT. Here is a very serious and difficult question of law. I have had no time to think about the matter at all since counsel presented their prayers for instructions, and I think that it may be as well for me to receive [reject] all the instructions that are offered and to direct the jury to return a verdict for the Caveatees. You can then take the case to the General Term and present this question. If you desire to present this instruction I should suggest to you to perfect it so as to show that these acts were fraudulently done. The Court might hold this did not meet the question, because, *non-constat* it might have been done innocently. I have gone on the assumption all of the time that they were fraudulently done, but I think that should not be left to

inference in the instructions. Then, in my judgment, you have the question contained in that instruction which determines this case so far as the will is concerned. The jury, if that instruction was given, might find against you, and there is ample room for them to do so, in my opinion. But if they are directed to find against you by the Court then that question is there to be passed upon by the Court in General Term. In either event the case will go to the General Term, there is no doubt abont that. It will save counsel a long argument in this hot weather and the case can go, it occurs to me, in better form to the General Term, perhaps on such an instruction as that to the jury than upon any other. It presents the sharp question whether or not the Court is justified in refusing that and it is a question contained in a narrow compass, and to be considered by the Court in General Term.

"I think either party would be justified in taking the case up, because I look upon it as a question novel in its character and as a difficult proposition of law under the peculiar circumstances of this case. It ought to go to the General Term. I want to see it go there and I want the General Term to settle it. You have tried the case very carefully and got the testimony all in. I think you have raised all the questions and got the matter in shape, so that you can take the case to the General Term." (Transcript, p. 479)

A motion for a new trial upon exceptions was then made (Transcript, p. 178), and a bill of exceptions settled (Transcript, p. 181), to be heard in the General Term.

The same was there heard and the judgment of the Special Term affirmed and a new trial denied. (Transcript, p. 829.)

Thereafter the defendants in error filed their motion

in the Special Term for Orphans' Court business for a judgment upon the verdict so directed as aforesaid. (Transcript, p. 833.)

To this the plaintiff in error objected; but the Court overruled the objection and entered a final judgment in this case admitting the papers to probate as the last will and testament of David McIntire, and decreeing the costs to be paid by plaintiff in error.

That judgment is in the following form: (R. p. 842)

"Upon consideration of the verdict of the jury rendered upon the issues heretofore sent to be tried involving the validity of the paper writing purporting to be the last will of David McIntire, deceased, certified to this Court from the Special Term sitting as a Circuit Court and filed on the 15th day of January, 1891, and of the objections thereto filed by the caveator on the 6th day of February, 1891, it is ordered, adjudged and decreed by the Court this 9th day of February, 1891, that the said objections be and they are hereby overruled; that the motion of the caveator for a new trial of said issues is hereby denied; *that the said paper writing be and the same is hereby admitted to probate as the last will and testament of David McIntire, deceased*, and that the cost of this proceeding be taxed against the estate of the caveator and be paid by his administrator."

From this judgment the plaintiff in error appealed to the General Term—the appeal being in form following:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding a Special Term for Orphans' Court Business.

IN RE ESTATE OF DAVID MCINTIRE. } No. 1,532. Doc. 11.

Now comes the Caveator, Charles McIntire, Administrator of Charles McIntire, deceased, and appeals to the General Term from the order entered herein, on the 9th day of February, A. D. 1891.

J. M. WILSON,
CALDERON CARLISLE,
WM. G. JOHNSON,
Counsel for Caveator.

Filed February 12, 1891.

Endorsed: Appeal taken by J. M. Wilson, Calderon Carlisle and William G. Johnson, Counsel for Caveator. (Transcript, p. 844.)

Among the Docket entries appears the following: (Transcript, p. 845)—"Feb. 12, 1891. Appeal taken from the order of the 9th inst., entered herein. Filed."

There being thus, a final and complete judgment establishing the will, there was nothing further to be done by the court except to execute that judgment unless it should be reversed upon the appeal to the General Term. The Court in General Term had fully considered the case at the former hearing, and did not desire to reverse this final and complete judgment of the special term, but although they refused to affirm *pro forma*, to which the plaintiff in error offered to submit, they did actually affirm by the order dismissing the appeal. Their order was as follows:

"This cause having been submitted to the Court

by the caveator upon the appeal from the order passed at the special term for Orphans' Court business February 9, 1891, and the caveatees having moved to dismiss said appeal, it is by the Court in General Term, this 16th day of July, 1892, upon consideration thereof, ordered that the said appeal be and the same is hereby dismissed." (Transcript, p. 87.)

There was, therefore, an absolute and final judgment of the special term disposing of the title to this very large estate, and the appeal therefrom was dismissed in General Term, and the question now arises whether this Court has jurisdiction to review that final judgment or whether the Supreme Court of the District can by dismissing an appeal, affirm a final judgment of that Court and by such form of proceeding defeat the jurisdiction of this Court to review it.

The defendants in error contend that the writ of error brings here for review the order of July 16, 1892, dismissing the appeal to the General Term from the final judgment in the case, *and nothing else;* that that order is a *discretionary* one under the rules of practice and not reviewable by this Court; that *it* is not a final judgment in the case and therefore the writ of error must be dismissed.

I.

The necessary and obvious effect of the action of the General Term in dismissing the appeal was to affirm the judgments of the Special Term, admitting the will to probate, and the form of that affirmance is immaterial, for, as said by this Court: "If, by *any direction*, the entire case is, in fact determined, *the decis-*

ion, when reduced to form and entered in the records of the Court, *constitutes a final judgment*, subject in a proper case to our review, whatever may be its technical designation."

Commissioners vs. *Lucas*, 93 U. S., 113, 114.

In that case there was an appeal from an order granting preliminary injunction and the Supreme Court of Indiana reversed the order granting the injunction and directed the dismissal of the case, and without waiting for such dismissal, the parties sued out the writ of error and the jurisdiction of this Court was sustained as above.

In *Mower* vs. *Fletcher*, 114 U. S., 127, 128, the Supreme Court of California reversed, with costs, the judgment of the State District Court with directions to the Superior Court to enter judgment for the plaintiff.

Motion was made to dismiss the writ of error on the ground that there was no final judgment. The motion was overruled, the Court saying: "That judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here the Court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* vs. *Brinckerhoff*, 106 U. S., 3, and the numerous cases there cited. The judgments in these cases are of that character. *The litigation is ended and the rights of the parties on the merits have been fully determined.*"

The same test was applied in the case of *St. Louis Iron Mountain and Southern R. R.* vs. *Southern Express Co.*, 108 U. S., 29, where a motion to dismiss

was denied, this Court say: "The suit was brought to compel the railway company to do the express company's business The controversy was about the right of the express company to require this to be done on payment of lawful charges. It was no part of the object of the suit to have it definitely settled what these charges should be for all time. The point was to establish the liability of the railway company to carry. The decree requires the carriage, and fixes the compensation to be paid. It adjudges costs against the railway company and awards execution. Nothing more remains to be done by the Court to dispose of the case."

In *ex parte* Norton, 114 U. S., 242, a motion to dismiss was made and the Court denied the same, stating the rule, as the result of other cases, thus:

"A decree is final for the purpose of an appeal when it terminates the litigation between the parties, and leaves nothing to be done but to enforce by execution what has been determined. Under this rule we think this appeal was well taken; the decree settled everything in dispute between the parties and left nothing to be done but to complete the sale, etc."

In the case of *Winthrop Iron Company* vs. *Meeker*, 109 U. S., 183, the Court also refused to dismiss, saying: "In our opinion the decree as entered is a final decree within the meaning of Section 692 of the Revised Statutes regulating appeals to this Court. The whole purpose of the suit has been accomplished."

In *Lewisburg Bank* vs. *Sheffey*, 140 U. S., 452, this Court held a decree to be final for the purpose of an appeal because, as there said the decree

"finally determined the entire controversy litigated between the parties and nothing remained but to carry the decree into execution."

In *Beebe* vs. *Russell*, 19 How., 385, this Court said:

"When a decree finally decides and disposes of the whole merits of the cause and reserves no further questions or directions for the future judgment of the Court, so that it will not be necessary to bring the cause again before the Court for its final decision, it is a final decree."

Such is the case here. The sole question involved in this litigation was one of will or no will. The judgment of the Court establishes finally the alleged will and the title of the plaintiff in error is denied, while that of the defendants in error is upheld. The estate is in the custody of the Court, and unless the judgment establishing the will be reversed must be distributed, in accordance with the will, by the administrator, c. t. a.

Counsel for defendants in error have not suggested anything which the Court below must do or can do in order to make the decree final between the parties, while it is obvious from the decree itself that it finally determines the litigation.

The theory of the defendants in error and of the Court below, in General Term, was to prevent the review of this final judgment by entering an order dismissing the appeal instead of a simple affirmance of the judgment below.

But, as we have already seen, however justified the majority of the Court in General Term may have felt in obstructing the right of the plaintiff in error to review that judgment, it cannot be accomplished

by that means, because, as ruled here in *Commissioners* vs. *Lucas*, 93 U. S., p. 114, this Court does not consider the *form* of the judgment below, but its *legal effect*, and if that be such as finally disposes of the rights of the parties, it is a final judgment for the purpose of a writ of error from this Court.

It is worthy of note that in the cases cited in the brief of counsel for defendant in error the majority of them are cases where the jurisdiction of this Court was maintained, while in the others the cases were dismissed, because further proceedings below were necessary to a determination of the cases.

II.

But assuming, what is not admitted, that the dismissal of the appeal is the only matter before the Court, it will be found on examination that that order is reviewable by the Court under the writ of error herein.

In the case of *Metropolitan R. R.* vs. *Moore*, 121 U. S., 558, the only question presented and decided by this Court was the right of the General Term to dismiss an appeal. In that case a motion for a new trial had been made which, under the rules of practice of the Court, was not reviewable in the General Term, and the Court dismissed the appeal.

This Court held, however, that while the action of the General Term in granting or refusing the new trial would not be reviewable, that its action in dismissing and in refusing to hear the appeal was reviewable, and it did review that action and reversed the judgment on the ground that section 772 of the Revised Statutes of the United States relating to the

District of Columbia gave the right of appeal from every order involving the merits of the action which the General Term was not by law at liberty to deny, notwithstanding its rule of practice.

In *ex parte* Brown, 116 U. S., 401, the Supreme Court of Washington dismissed an appeal from the District Court of the Territory, because the appellant failed to assign error as required by the rules of practice of that Court, and application was made to this Court for a mandamus to compel the Supreme Court of the Territory to reinstate the appeal and decide the case on its merits.

The writ was refused, the Court, through Mr. Chief Justice Waite, saying:

"*This is a judgment which can only be reviewed upon writ of error or appeal, as the case may be.*" (p. 402.)

The same case was then brought to this Court on appeal from that judgment of the Supreme Court of the Territory dismissing the appeal to it, and though a motion to dismiss on other grounds was made, the jurisdiction of this Court to review an order dismissing an appeal for non compliance with rules of practice was not questioned but was maintained.

Brown vs. *McConnell*, 124 U. S., 489.

In *Brown* vs. *Rank*, 132 U. S., 216, an appeal from the Supreme Court of the Territory of Washington, which had dismissed an appeal to it for the same reason (failure to assign error as required by its rules of practice), this Court took jurisdiction of the appeal, reviewed the order of the Supreme Court of the Territory and affirmed the same.

It was not even suggested that this Court was without jurisdiction in these cases to review the judgments of the courts below dismissing the appeals for non compliance with their rules of practice.

So that even if it be conceded that the only question presented by the pending writ of error is the correctness of the ruling of the Court below is dismissing the appeal to it, that would not furnish ground for dismissal of the writ of error. The appeal to the General Term from the final decree establishing the will was a matter of right, given by express statutory enactment (Section 772, Revised Statutes United States relating to the District of Columbia,) and it could never rest in the *discretion* of the Supreme Court of the District whether or not to hear such an appeal at General Term. It was the absolute right of the party to have his appeal heard and a *refusal* to hear it *if erroneous* can be and has been examined by this Court.

Met. R. R. vs. *Moore*, 121 U. S., 558;
Ormsby vs. *Webb*, 134 U. S., 58-59.

Whether the action of the General Term was reroneous cannot be considered upon this motion to dismiss, but it is proper for counsel to say that it will clearly appear when the full record is before this Court that the plaintiff in error was not in default as to any rule of practice of the said Court as to printing or otherwise, but that the Court below erred in holding that he had not done all that the law or the rules required in order to perfect his appeal to the General Term.

Not only the plaintiff in error was not in default but he had offered to submit to a decree by the General

Term affirming the decree against him in Special Term with a view to expediting the determination of the case in this Court, and counsel call attention to the opinion of the majority of the Court below dismissing the appeal (printed with the motion to dismiss, pp. 14 and 15), which declares that their purpose was to prevent a review of their judgment by this Court.

III.

The foregoing propositions seem to counsel to be conclusive of the questions upon which the motion to dismiss depends, but it is deemed not improper to suggest an additional consideration.

The writ of error is not like an appeal directed to any specific adjudication by the Court below.

An appeal is always taken from some specific decree of the Court appealed from, while a writ of error is addressed to the Court requiring them to send up the entire record, and the only condition to its issuance is that there shall be a final judgment in the case, and that the writ of error shall be sued out within two years from the entry of such final judgment.

Is there a final judgment in this case?

This Court, in the case of *Ormsly* vs. *Webb*, 134 U. S., 58; a case in which the proceedings were exactly the same as in the case at bar, said:

"That an order in the Supreme Court of the District, at Special Term, admitting a will to probate and record *is a final judgment, cannot, it seem to us, be disputed.* It was so declared in *Van Ness* vs. *Van Ness*, and *Brown* vs. *Wiley*. A will admitted

to probate and record by a Court of competent jurisdiction, is a muniment of title for all receiving property under it; and until the order so admitting it to probate is, by some appropriate proceeding, set aside or reversed, stands in the way of those who have resisted the probate. *In every sense it is a final adjudication.*"

While that judgment was final, it was still open to review and reversal by the General Term upon appeal, and no writ of error could be sued out while that Court still had control of the judgment and the power to change it.

But when the General Term had exhausted its power over the judgment by giving it finality and conclusiveness, so far as it could, either by affirmance or by a dismissal of the appeal therefrom, it then became such a judgment as this Court could review upon writ of error.

Section 753 of the Revised Statutes of the United States, relating to the District of Columbia, provides, *inter alia* that "the judgments, decrees, sentences, orders, proceedings and acts of the general terms, *special terms*, circuit courts, district courts and criminal courts, rendered, made, or had, are and shall be deemed judgments, decrees, sentences, orders, proceedings and acts of the *Supreme Court*."

Section 705 of the Revised Statutes of the United States provides, that "the *final judgment of the Supreme Court* of the District of Columbia" * * * * * * "may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal," &c.

There being, therefore, a final judgment of the

Supreme Court, determining the rights of the parties it is brought within the doctrine announced by this Court in *Ormsby* vs. *Webb*, *supra*, p. 63, where the Court says: "If these proceedings, in which there are adversary parties and the issues in which involve rights of property exceeding in value the jurisdictional amount, be within the meaning of the statute, as we hold it is, "a case" which has been finally determined by the Supreme Court of the District, our *authority to determine* the questions of law, properly raised, and which in the Court below, *in any of its divisions*, controlled the right to have the will probated, *cannot be affected* by the circumstances that original order of probate simply followed the finding of the jury, and was made by the Court below, *held by a single justice not by the Court in General Term*."

It is true that Mr. Justice Harlan, who delivered the opinion in *Ormsby* vs. *Webb*, *supra*, and who allowed the writ of error in this case when he allowed the writ, gave no opinion, but it is not improper to say that the same was allowed after full hearing on notice and that the grounds now relied upon by defendants in error for the dismissal of the writ were urged upon Mr. Justice Harlan as objections to its issuance.

It is respectfully submitted that the motion to dismiss must be denied.

JEREMIAH M. WILSON,
CALDERON CARLISLE,
WM. G. JOHNSON,
for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
FEB 1 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES McINTIRE, JR., Administrator, &c., *Plaintiff in Error.*

vs.

EDWIN A. McINTIRE *et al.*, *Defendants in Error.*

No. 1,128.

Additional Brief for Plaintiff in Error in Opposition to Motion to Dismiss.

In the supplemental brief for the defendants in error counsel attempt to show the rightfulness of the action of the General Term in dismissing an appeal, and in support thereof print portions of certain papers on file in the court below. (Supplemental Brief, pp. 13-17.)

The contention now made is, in substance, that the rule of court requires ten printed copies of the record to be filed in the General Term; that plaintiff in error has admitted, upon the record, that such printed copies were not filed, and that therefore the order of dismissal was rightly made.

It is respectfully insisted that the *rightfulness* of that or any other order of the court below is not now before this Court, and cannot properly be argued or

considered upon this motion which is one *to dismiss for want of jurisdiction.* (Motion of Def'ts in Error, p. 1.)

Nevertheless, counsel feel bound to present briefly their views in opposition to that contention because they conceive it to be not only entirely erroneous but also tending to mislead the Court.

The rule referred to and printed with the motion (pp. 9 & 10) requires printed copies of the record to be filed "*before the* FIRST DAY *of the term on the calendar of which the case is entered.*"

The case was *not calendared for the April Term* 1892 *or any previous term*, but was *added* to the calendar at the *end* of the April term, *by request of Counsel*, and as shown by the objection of the defendants in error (motion p. 3, paragraph 2) and the opinion of the Court (Ib., p. 12) was never lawfully on the calendar. It was therefore *physically* as well as *legally* impossible for the plaintiff in error to be in default in respect of filing the printed record under the rule.

As to briefs, the rules require them to be filed "at least *six days* BEFORE the case is *called for argument.*"

The case never was "called for argument" and could not have been except by special order as it was not on the calendar.

Therefore, no default in this respect was possible.

It is proper, also, to add, that the appeal taken was only *pro forma*, not founded upon any adversary proceeding at Special Term, but merely from a *formal entry* of a *judgment* in *strict conformity* with the *previous judgment on the merits* at the General Term.

Moreover, as appears by the transcript of record herein (transcript, p.) there was on file in the General Term at that previous hearing, a printed record and briefs in accordance with the rule and upon which every question in the case had been heard and decided.

No new question had arisen or been decided, the judgment appealed from being the formal and necessary consequence of, and in obedience to, the decision in General Term.

These contentions will be fully supported by the record when properly before the Court.

As the supplemental brief presents no other new contention it is not deemed proper to further extend the discussion, but it is respectfully submitted that on the authorities presented in the original brief in opposition to the motion, the jurisdiction of the Court is clear and the motion should be denied.

JEREMIAH M. WILSON,
CALDERON CARLISLE,
WM. G. JOHNSON,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 30 1893
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES McINTIRE, JR., ADMINISTRATOR OF CHARLES McINTIRE, DECEASED,
Plaintiff in Error,

v.

EDWIN A. McINTIRE ET AL.,
Defendants in Error.

No. 1128.

Error to the Supreme Court of the District of Columbia
On Motion to Dismiss Writ of Error.

Supplemental Brief of S. S. Henkle,

Counsel for Defendants in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLE McINTIRE, JR., ADMINISTRATOR OF CHARLES McINTIRE, DECEASED, PLAINTIFF IN ERROR,

v.

EDWIN A McINTIRE ET AL., DEFENDANTS IN ERROR.

No. 1128.

Supplemental Brief of S. S. Henkle, Counsel for Defendants in Error, in Favor of the Motion.

In consequence of statements made, authorities cited, and arguments not anticipated in the brief of counsel for the plaintiff in error, I have deemed it best to submit this supplemental brief in answer to the brief of counsel for plaintiff in error.

In this brief I have endeavored to limit the discussion to a reply to such points and authorities as were not anticipated or discussed in the original brief.

I Propose to Review Some of the Authorities Cited and Relied upon by Counsel for the Plaintiffs in Error, and to Show that They Conclusively Sustain My Contention.

Ex parte Brown and another, 116 U. S. 401.

This case is cited by the plaintiff in error to show that an appeal or writ of error will lie to this Court from an order of the supreme court of the Territory of Washington dismissing an appeal to that court from the territorial district court because errors had not been assigned in accordance with the rules of practice of that court applicable to the form of action.

Upon examination it will be found that the case does not aid the plaintiff in error, but, on the contrary, directly supports the contention of the defendant in error.

The statement of the case in the report in 116 U. S., although perhaps sufficient for the purposes of the decision upon the application for mandamus, is not sufficient to give a correct idea of the question that was decided by the supreme court of the Territory of Washington, as is apparent from the opinion of Chief Justice Waite. The statement says (p. 401) substantially that petitioner commenced a suit in ejectment in the district court of Washington Territory; the defendant answered, denying the plaintiff's right to recover, and setting up various separate defences, to which the plaintiff demurred; the court sustained the demurrer, and the plaintiff standing by his demurrer, the case was dismissd From this judgment the plaintiff appealed to the supreme court of the Territory. In that court the defendant moved to dismiss the appeal because the action was at law and could be re-examined only on a writ of error; that the motion was sustained and judgment entered accordingly, etc.

It will be seen that the opinion of Chief Justice Waite does not tally with this statement of the case.

The opinion says: "According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, *because errors had not been assigned in accordance with the rules of practice applicable to the form of action.* This is a judgment which can only be reviewed by writ of error or appeal, as the case may be. Mandamus lies to compel a court to take jurisdiction, but not to control its discretion while acting within its jurisdiction. The rule is elementary."

Counsel for the plaintiff, in their brief (p. 12), assume that the court meant to decide that this Court would entertain an appeal or a writ of error from a judgment of an intermediate appellate court dismissing an appeal from a primary court because of a failure to comply with the rules of the court in taking the appeal. It will be manifest in following the subsequent history of this case in this Court in the two subsequent cases of Brown *v.* McConnell (124 U. S. 489) and Brown *v.* Rank (132 U. S. 216) that no such thing was intended. What *was decided* in *Ex parte* Brown (116 U. S.) was that the court below had jurisdiction of the case before it, and had acted upon it, and that while mandamus would lie to compel the court to act if it refused, having acted, mandamus would not lie, and if there was any remedy at all it would be by writ of error or appeal, depending upon whether it was a legal or equitable proceeding. Hence mandamus would not lie.

It seems that after this decision upon the mandamus Brown went back and took an appeal to this Court from the judgment dismissing the appeal from the district court to the supreme court of the Territory, and the case reappeared here as Brown *v.* McConnell, in 124 U. S. at 480, upon a

motion to dismiss the appeal to this Court for want of proper allowance and for want of bond, etc. This Court, after considering the questions involved in the motion, ordered that the appeal stand dismissed unless bond be given by a day named, etc.

In the hearing at that time no other question was made and nothing else was decided.

The case reappears in the name of Brown *v.* Rank, in 132 U. S. at 216. If it is not the same case it is identical with the original case of *Ex parte* Brown in 116 U. S., and must have been brought at the same time, by the same plaintiff, against another party defendant, involving all the same facts, pleadings, and judgment.

For the purpose of ascertaining the precise question in the case, I have examined the original record of the case in the clerk's office.

The plaintiff, Brown, commenced a possessory action against the defendant, Rank, in the territorial district court. Rank answered denying the right of the plaintiff to recover, and setting up in addition four special defences. To these the plaintiff demurred. The court overruled the demurrer, and the plaintiff standing by his demurrer, judgment was entered against the plaintiff. From this judgment he took an appeal to the supreme court of the Territory. Rule 5 of that court, regulating appeals and writs of error, provided that in case of writs of error "a particular description of errors assigned should accompany the writ." In case of appeal this was not required. Under the code practice of Washington Territory legal and equitable defences might be joined and the judgment would be on the law or equity side of the court, as the court should determine whether the case was in its nature legal or equitable. The defendant, claiming that the judgment was upon the law side of the court, filed a motion

to dismiss the appeal upon the ground that there was no assignment of errors as required by Rule 5, prescribing the mode of bringing cases into that court by writ of error.

The opinion of the supreme court of the Territory is in the record and I give it in full:

"Brown *et al. v.* Rank.

"Gazing at this motion we see but a single question necessary to its decision, namely, whether the cause is to be deemed one in equity or one at common law. Our rules require an assignment of errors in a law but none in an equity cause. Dismissal of the appeal would be the natural sequence of holding this to be a cause at law, for there is no assignment of errors here. We gather from the record that the appellants, who were the plaintiffs below, are seeking to open up a judgment rendered upon overruling a demurrer to the answer. In answering, defendant, beside denial, pleaded four affirmative defences, to the three last of which plaintiff interposing a limping demurrer. Legal and not equitable all these defences are conceded to have been, unless the fourth, which was addressed to the judge, and apparently was intended as a plea of equitable estoppel. Let the intent as to the last have been what it may, the matter pleaded did not, in our opinion, display facts sufficient to constitute a defence of any description. Jurisdiction is to be determined by presuming everything to be of common law cognizance. Until the necessity of invoking equitable jurisdiction appears, unless we are to give an unreasonable force to the address of the fourth defence to the judge, we are unable to see any necessity for him to act in the capacity of chancellor in deciding the demurrer. Decision of the demurrer was, we think, a decision at law. Getting the cause here for review of that decision is a proceeding in the nature of a writ of error. *Errors, therefore, should have been assigned, conformably to Rule* 5. *Appeal dismissed.*"

Said Chief-Justice Fuller, in deciding the case in this Court, at page 218:

"No assignment [of errors] having been made, the appeal was dismissed for non-compliance with the rule in that particular (Brown *v.* Hazard, 2 Wash. Territory, 464), and the case comes before us on appeal from the judgment of dismissal. As the rule did not require such assignment in an equity cause, the question passed upon was whether this cause should be held as one in equity or at law, and the court decided it was the latter."

The opinion then proceeds to review the act of Congress relating to the practice of the territorial courts and the code of Washington Territory, showing that equity and law jurisdictions may be mingled in the same cases, and concludes:

"The final judgment was one dismissing the action at law, and upon the pleadings as they stood was not a judgment in the exercise of chancery jurisdiction. The supreme court correctly held that the cause was at law and not in equity, and, this being so, *it is not denied that the dismissal for non-compliance with the rule necessarily followed.*"

There was in this case a question which might be, and was, properly reviewed upon appeal, viz., whether the judgment appealed from involved legal or equitable jurisdiction; but that having been determined in favor of the former, "*it is not denied that the dismissal for non-compliance with the rule necessarily followed,*" says the Court. In other words, it having been determined that it was a case to which the rule applied, this Court would not undertake to review the judgment of the court in the enforcement of its own rules regulating its own practice, and this is in harmony with all the cases.

The, question, then as the supreme court said, was whether the case was at law or in equity. If at law, the 5th rule, requiring an assignment of errors, had not been

complied with, and the appeal should be dismissed. If in equity, the 5th rule did not apply and the appeal was properly taken.

The court held that the case was at law, *and for want of compliance with Rule 5, requiring an assignment of errors, the appeal was dismissed.*

This Court, in the opinion by Mr. Chief-Justice Fuller, fully sustains the reasoning and the judgment of the supreme court of the Territory.

In the light of the fuller statement of the case in Brown *v.* Rank, in 132 U. S., we can understand what Mr. Chief-Justice Waite meant in *Ex parte* Brown, in 116 U. S., at 402, when he said: "According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be."

The Court did not mean, as counsel for the plaintiff in error have argued, that a judgment dismissing an appeal for failure to comply with a rule of practice of the appellate court regulating the mode of bringing cases before it might be reviewed in this Court by writ of error or on appeal, but the Chief Justice was speaking of the case before the Court, and the judgment of dismissal in that case did contain a question which properly might be and subsequently, in Brown *v.* Rank, in 132 U. S., was reviewed in this Court, namely, as to whether the judgment was at law or in equity. That being determined, it followed, as of course, that the supreme court of the Territory properly dismissed the appeal, under the rule, for want of an assignment of errors.

Counsel for the plaintiff in error have totally miscon-

"No assignment [of errors] having been made, the appeal was dismissed for non-compliance with the rule in that particular (Brown *v.* Hazard, 2 Wash. Territory, 464), and the case comes before us on appeal from the judgment of dismissal. As the rule did not require such assignment in an equity cause, the question passed upon was whether this cause should be held as one in equity or at law, and the court decided it was the latter."

The opinion then proceeds to review the act of Congress relating to the practice of the territorial courts and the code of Washington Territory, showing that equity and law jurisdictions may be mingled in the same cases, and concludes:

"The final judgment was one dismissing the action at law, and upon the pleadings as they stood was not a judgment in the exercise of chancery jurisdiction. The supreme court correctly held that the cause was at law and not in equity, and, this being so, *it is not denied that the dismissal for non-compliance with the rule necessarily followed.*"

There was in this case a question which might be, and was, properly reviewed upon appeal, viz., whether the judgment appealed from involved legal or equitable jurisdiction; but that having been determined in favor of the former, "*it is not denied that the dismissal for non-compliance with the rule necessarily followed,*" says the Court. In other words, it having been determined that it was a case to which the rule applied, this Court would not undertake to review the judgment of the court in the enforcement of its own rules regulating its own practice, and this is in harmony with all the cases.

The, question, then as the supreme court said, was whether the case was at law or in equity. If at law, the 5th rule, requiring an assignment of errors, had not been

complied with, and the appeal should be dismissed. If in equity, the 5th rule did not apply and the appeal was properly taken.

The court held that the case was at law, *and for want of compliance with Rule 5, requiring an assignment of errors, the appeal was dismissed.*

This Court, in the opinion by Mr. Chief-Justice Fuller, fully sustains the reasoning and the judgment of the supreme court of the Territory.

In the light of the fuller statement of the case in Brown *v.* Rank, in 132 U. S., we can understand what Mr. Chief-Justice Waite meant in *Ex parte* Brown, in 116 U. S., at 402, when he said: "According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be."

The Court did not mean, as counsel for the plaintiff in error have argued, that a judgment dismissing an appeal for failure to comply with a rule of practice of the appellate court regulating the mode of bringing cases before it might be reviewed in this Court by writ of error or on appeal, but the Chief Justice was speaking of the case before the Court, and the judgment of dismissal in that case did contain a question which properly might be and subsequently, in Brown *v.* Rank, in 132 U. S., was reviewed in this Court, namely, as to whether the judgment was at law or in equity. That being determined, it followed, as of course, that the supreme court of the Territory properly dismissed the appeal, under the rule, for want of an assignment of errors.

Counsel for the plaintiff in error have totally miscon-

ceived the question before the Court in this series of cases. They have assumed that the question was as to whether a judgment dismissing an appeal for want of compliance with a rule of the appellate court prescribing the mode of bringing the case up, pure and simple, might be reviewed in this Court upon writ of error or appeal, and they seem to think that this Court has so held. The motion to dismiss the appeal was, in fact, based upon the failure to comply with the rule, but whether the rule was applicable to the case or not depended upon whether the case was of legal or equitable cognizance, and that was the only question before the supreme court of the Territory and before this Court. That was a question entirely outside of the rule and depended upon legal principles, and was properly a question, and the only question, as we have seen, which was discussed by the supreme court of the Territory upon the motion to dismiss the appeal, and when the conclusion was reached, that it was a law case, the court enforced the rule by dismissing the appeal, and this Court reviewed the decision upon the question as to whether it was legal or equitable, and having arrived at the conclusion that it was a case at law the Chief Justice said in conclusion:

"The supreme court correctly held that the cause was at law, and not in equity, *and, this being so, it is not denied that the dismissal for non-compliance with the rule necessarily followed.*"

It seems to me that this case is conclusively in favor of my contention that the order of the supreme court in general term dismissing the appeal from the special term, sitting for probate business, for want of compliance with a rule of the court regulating the mode of prosecuting appeals from the special term to the general term, and involving no other question of law or equity, is not

reviewable in this Court either upon writ of error or upon appeal. I have reviewed this case at some length because the language used by Chief-Justice Waite in deciding the motion for the allowance of a writ of mandamus in *Ex parte* Brown (116 U. S.) seemed to give some countenance to the contention of counsel for the plaintiff in error, that a judgment dismissing an appeal for failure to comply with a rule of the court regulating the removal of causes from the primary into an appellate court might be brought to this Court upon appeal or by writ of error, according as the case was at law or in equity.

But upon the examination of the case it is found that no such thing was decided, but, on the contrary, the court in Brown *v.* Rank (132 U. S.) held distinctly that where the judgment was simply a dismissal for failure to comply with a rule of the appellate court this Court would not undertake to question it, and I, with perfect confidence, assert that to be the law everywhere unless the statute or rules of court otherwise provide.

On p. 13 of the brief counsel for the plaintiff in error say:

"The appeal to the general term from the final decree establishing the will was a matter of right given by express statutory enactment (sec. 772, Rev. Stats., Dist. Col.), and it could never vest in the *discretion* of the supreme court of the District whether or not to hear such an appeal to the general term. It was the absolute right of the party to have his appeal heard, and a refusal to hear it, if erroneous, can be and has been examined by this court.

"Met. R.R. *v.* Moore, 121 U. S. 558.

"Ormsby *v.* Webb, 134 U. S. 58–59."

It is not denied that the plaintiff had a right to appeal from the judgment of the special term admitting the will

of David McIntire to probate and record, and if the appeal had been properly taken and brought into the court he had a right to have it heard by the general term.

But in order to entitle the plaintiff in error to have his appeal heard upon the merits he must properly bring his case before the court; that is to say, he must comply with the rules of the court prescribing the mode in which the appeal shall be taken and prosecuted. If he fails to comply with the rules of the court made for that purpose or undertakes to totally disregard or set them at defiance, he has no right to have his appeal heard upon the merits, but, on the contrary, it is the right and duty of the court to dismiss it unless it finds some reasonable excuse for the party's delinquency. If litigants in courts may utterly disregard the rules of practice made for the orderly conduct of the business of the courts, disorder and confusion would soon prevail and bring the administration of justice into contempt.

But it is and ought to be within the discretion of the court when to enforce and when to excuse the exact compliance with these rules; but this discretion is never subject to the review of any other court, unless it be apparent that there was a clear and manifest abuse of the discretion of the court.

The act of Congress organizing the supreme court of the District of Columbia conferred upon the general term the absolute power to make rules regulating the time and manner of making appeals from the special to the general terms.

Sec. 770, Rev. Stats. of the District of Columbia, is as follows:

"The supreme court in general term may adopt such rules as it may think proper to regulate the time and

manner of making appeals from the special term to the general term, and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time to revise and alter such rules."

In pursuance of this absolute authority the general term made rule No. 90, set out in the Record, prescribing the mode of bringing cases before the general term upon appeal from the special terms

There is no pretence that the plaintiff in error complied with this rule by filing printed copies of the record. Indeed in his answer to the motion to dismiss the appeal he admits that he did not file the printed record as required by the rule, and asked the court to excuse him from the application of the rule, which the court refused to do, but dismissed the appeal.

This Court has a rule requiring the party bringing a case here by appeal or writ of error to cause the record to be printed, and if he fails to do so the appeal or writ of error will be summarily dismissed when the case is reached in the call. No one ever pretended that this Court was bound to hear the case upon the merits.

The case is precisely the same in principle with the one we are considering. The appeal is dismissed in both courts for failure to comply with a rule of court requiring the appellant or plaintiff in error to print the record. This Court might excuse the delinquency if it found reasons for doing so, but if it refused the party would have no right to insist upon the hearing of his case.

There is no injustice or hardship about it at all, and it is done at every term of this Court.

Counsel for plaintiff in error cite—

Met. R.R. *v.* Moore, 121 U. S. 558;

Ormsby *v.* Webb, 134 U. S. 58-59,

to the point that the general term was bound to entertain their appeal.

In the former case the question was as to whether the general term was bound to review upon appeal a judgment of the special term based upon the overruling of a motion for a new trial for alleged error by the trial justice in instructing the jury to return a verdict for the defendant for insufficient evidence. This Court held that under the provisions of the law creating and defining the jurisdiction of the court all judgments involving the merits of the controversy were appealable from the special to the general term. But such a judgment in the general term would not be reviewable in this Court, because it was discretionary. It was not held that an appeal might in that or any other case be brought from the special to the general term in utter disregard of the rules of the court providing for the mode of taking appeals.

In the case of Ormsby and Webb (134 U. S.) this Court held that a judgment of the special term, sitting for probate business, admitting a will to probate and record was a *final* judgment, from which an appeal might be taken to the general term, and the judgment of the general term affirming that judgment might be reviewed here on error.

No principle decided in either of these cases is in any way involved in this case.

I concede that the judgment of the special term admitting the will of David McIntire to probate and record was a *final* judgment of that court, and that the caveator in that court was entitled to take an appeal to the general term, and to have the judgment there "*affirmed, reversed, or modified.*" But the statute made it the duty of general term to make rules providing for the time and the manner of making such appeals. And in order to entitle the

party to have his appeal heard in the generrl term he must comply with these rules. This he did not do, as he admitted in his answer to the motion to dismiss his appeal, and for this failure to comply the court dismissed his appeal.

COUNSEL FOR PLAINTIFF IN ERROR ADMIT THEY HAVE NO CASE ON THIS MOTION.

On p. 13 of their brief counsel for the plaintiff in error say:

"Whether the action of the general term was erroneous cannot be considered upon their motion to dismiss."

Here is an express admission that the order of the general term dismissing the appeal cannot be reviewed in this Court, on this motion to dismiss. For the purposes of this motion, then, the order of dismissal must be assumed to be conclusive. It is for alleged error in the making of that order that the writ of error was allowed. There was nothing else before the court.

But, say counsel: "It will clearly appear, when the full record is before the court, that the plaintiff in error was not in default as to any rule of practice of the said court as to printing or otherwise, but that the court below erred in holding that he had not done all that the law or rules required in order to perfect his appeal to the general term."

There is no occasion for having the full record, except so far as it was before the general term when it dismissed the appeal, and the statement of counsel that the full record would show that the plaintiff in error was not in default as to any rule of practice of the court as to printing or otherwise, and that the court erred in holding that he was,

seems a little extraordinary when placed by the side of the 3d paragraph of the answer of counsel to the motion to dismiss the appeal upon the ground that Rule 90, providing for printing the record, etc., had not been complied with. (See Record, p. 6.) Says the answer (p. 6, Record):

"Third. *It is true that no printed record has been filed in this cause*, but it is respectfully submitted that as counsel did not intend to argue the appeal before the court, because of the fact that the order of the special term for orphan's court business appealed from was in strict accordance with the judgment already entered in the general term, and the appeal taken therefrom purely as *formal necessities*, the court will recognize that it *would be an idle and useless expense to print a record when the said appeal is not to be argued or considered* by the court, it raising purely the same questions as have been already argued and determined at the former hearing, *and counsel regard the case as being distinctly within the provisions of section 5 of the 90th rule, which provides that the court may for sufficient cause shown, by special order, dispense with the printing, which application is now made for the reasons above stated.*

"If it be the desire of the court to have the said cause argued before it, the caveator, by his *counsel, tenders himself ready to have a printed record and brief filed within five days, and to reargue the said cause at any date which the court may designate.*"

So it appears that when counsel were answering the motion to dismiss the appeal in the general term because Rule 90, providing for printing the record, had not been complied with, they did not set up, as they now do here, "that they *were in no default as to any rule of practice, as to printing or otherwise*," but they distinctly said that "*it is true that no printed record has been filed in this cause*," and then went on to set out reasons why they did not think it ought to be required, and then said: "*Counsel regard the*

case as within section 5 of Rule 90, which provides that the court may for sufficient cause shown, by special order, dispense with the printing, which application is now made for the reasons above stated."

Counsel did not in the general term intimate that there was anything in the full record of the case which would show that they had complied with Rule 90, as to printing the record, but, on the contrary, they distinctly *admitted that they had not*, and threw themselves upon 5th section of Rule 90, "*which provides that the court may for sufficient cause shown, by special order, dispense with the printing, which application is now made for the reasons above stated.*"

The Court will thus see that it is impossible that the full record should show a compliance with this rule as to printing the record, which counsel for plaintiff in error when before the court in general term admitted had not been complied with, and begged the court to dispense with their compliance.

Moreover, Mr. Justice Hagner, on pages 13, 14, 15 of the Record, in his opinion, discusses the reasons urged by counsel for plaintiff in error in this Court, and for caveator in the court below, why the court should not dismiss their appeal for want of compliance with Rule 90 as to printing the record, and the reasons which controlled the court in refusing to dispense with the printing of the record, and for granting the motion to dismiss the appeal.

In concluding the opinion, Mr. Justice Hagner said:

"As to the printing, counsel say that they did not consider it worth while to have that done, because the case had been heard before and the same record would serve, but they state that they are now ready to have it done if it be required by the court.

"Now, are these reasons sufficient to justify the court, in annulling the rule so soon after it is adopted? We do not think so.

"We think the liberality hitherto shown by the court and its indisposition to compel their enforcement has done great harm, and we can see in this case no meritorious reason why the rule should be laid aside. Every judge in this court, except one, has sat in this case; the opinion of Mr. Justice Cox in the general term, which was a very clear one, sustained the judgment of the circuit court, and every justice who has had anything to do with it seems to be of the opinion that there is no merit in the case. We are told that some of the parties caveatees are very old. This case has been litigated for years, and if the case goes to the Supreme Court there would be three years more of delay. We think the caveator was not diligent, and a majority of the court is of opinion that this rule should be held to mean what it says, and therefore we think we ought not to grant the motion of the caveator, which will therefore be dismissed, and the motion of the caveatees to dismiss the appeal is allowed."

In the face of all this, counsel say further (pp. 13 and 14 of their brief):

"Not only the plaintiff was not in default, but he offered to submit to a decree of the general term affirming the decree against him in special term, with a view to expediting the determination of the case in this court, and counsel call attention to the opinion of the majority of the court below dismissing the appeal, which declares that their purpose was to prevent a review of their judgment by this Court."

How counsel justify the statement that they were not in default, in the face of their answer in the general term admitting that they were, I leave them to determine; but the suggestion that the general term dismissed the appeal to prevent a review of their judgment by this Court is utterly without justification.

The decision of the court was strictly in conformity to section 5 of rule 90 (see p. 10, Rec.):

"If the provisions of this rule in regard to printing are not complied with, the court may, on motion, order the case to be dismissed, or otherwise disposed of."

The rule was not complied with, as counsel in their answer admitted, and the court dismissed the appeal. Certainly that was legitimate, and should not subject the court to the charge that it was done to prevent a review of the case by this Court.

But the 5th section of the rule 90 also provided:

"But the court, or any justice thereof, may for sufficient cause shown, by special order, dispense with the application of this rule in any particular case upon motion and due notice thereof to the opposite party."

Counsel made application to the court to dispense with the application of the rule in this case, and urged certain reasons therefor. The court did not think the reason sufficient to justify it in dispensing with the application of the rule in this case, and refused to do it. It is true that the court may have been influenced in its refusal to dispense with the rule by the fact that all the judges, save one, had passed upon the case, and were all of the opinion that it had no merit, and for this reason, among the others assigned in the opinion, the court was not favorably inclined to excuse the failure of the caveators to comply with the rule. It is not to be thought of for a moment, that the high-minded and honorable jurists composing the bench of the supreme court of the District of Columbia, could have been influenced by the unworthy motive of keeping this Court from reviewing their decision.

"Is There Any Final Judgment in This Case?"

Under this heading, counsel for plaintiff in error cite Ormsby *v.* Webb (134 U. S.) to show that a judgment of the special term for probate business admitting a will to probate after verdict is a *final* judgment. This is not controverted.

They then (p. 15 of their brief) say:

"While that judgment was final, it was still open to review and reversal by the general term upon appeal, and no writ of error could be sued out while that court had control of the judgment and the power to change it."

Here, then, is a concession that while the judgment is *final* a writ of error will not lie from it to this Court until it has been taken to the general term by appeal and finally disposed of by that court.

Counsel Discover that a Writ of Error Will Lie Directly from this Court to the Special Term, which is a Novelty.

The brief proceeds:

"But when the general term had exhausted its power over the judgment by giving it finality and conclusiveness, so far as it could, either by affirmance or by dismissal of the appeal therefrom, *it then became such a judgment* as this Court could review upon writ of error," citing sec. 753 of the Rev. Stats. of the District of Columbia, which provides that the judgments, &c, of the general and special terms shall be deemed judgments, &c., of the supreme court.

Which means that the special terms and the general terms are alike to be known as terms of the supreme court of the District of Columbia, and judgments, whether

by the special or general term, are jud[illegible] Supreme Court.

Then they cite sec. 705 of the Rev. Stats. of the District, which provides—

That "the final judgment of the supreme court of the District of Columbia * * * may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal," &c.

Upon this foundation counsel argue that by the dismissal of the appeal (for it is not pretended that there was any affirmance) by the general term that court exhausted its power over the judgment and *it became a judgment* upon which a writ of error might be sued out to this Court; that is to say, that a writ of error might go from this Court directly to the judgment of the special term.

Of course it will be observed that this argument necessarily concedes that the order of dismissal of the appeal by the general term was not such a judgment of the general term as might be reviewed here upon error, and that in order to maintain this writ it must go to the judgment of the special term, jumping over and ignoring the general term.

The law creating the supreme court of the District of Columbia went into effect in 1863, and during the thirty years that it has been in working operation I venture the assertion that this is the first time such an idea was ever suggested, and it exemplifies the adage that "*necessity* is the mother of *invention*."

Counsel, however, attempt to make this Court responsible for this *novelty* by citing a passage from the opinion of Mr. Justice Harlan in Ormsby *v.* Webb (134 U. S.), *supra*.

As counsel have repeatedly referred to it, it may be well to recall what that case was.

It was a contest of a will similar to this in most of its features. It had been tried upon issues to a jury, and had gone to the general term upon exceptions, which had there been overruled, and the verdict of the jury sustaining the will had been certified to the special term holding the orphan's court, and that court had admitted the will to probate. From that judgment an appeal had been properly taken to the general term, and the judgment of the special term admitting the will to probate was affirmed. From this judgment of affirmance by the general term a writ of error was sued out to this Court. Said Mr. Justice Harlan in the opening sentence of his opinion: "The writ of error brings up for review a judgment of the supreme court of the District of Columbia in general term, which affirmed a final order of the same court in special term, admitting to record a certain writing," &c.

In this Court a motion was made to dismiss the writ of error for want of jurisdiction.

The motion was based upon a construction "of the statutes regulating the jurisdiction of the courts of the District and the decisions of this Court declaring their scope and effect."

The opinion elaborately discusses the statutes of Maryland and the acts of Congress and the decisions of this Court bearing upon the subject. It will be seen, however, that the passage cited by counsel cannot be legitimately made to sustain any such doctrine as that for which it is used. On the contrary, Justice Harlan repeatedly asserts that the writ of error from this Court must be to the judgment of the general term.

On p. 58, speaking of the judgment of probate by the special term, the opinion says:

"In every sense it is a final adjudication. And that an

order of probate made in the supreme court of the District special term is reviewable by the general term is made clear by the provision that a 'party aggrieved by any order, judgment, or decree in a special term involving the merits of the action or proceeding may appeal to the general term, which shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just.'

"Rev. Stats. D. C. 772."

"If so, how it is possible to question the jurisdiction of the general term to review such final order of probate?"

On p. 59:

"In respect to the authority of this court to re-examine the final judgment and decrees of the supreme court of this District, the words of the statute are quite as clear as those defining the jurisdiction of the general term to review the orders and judgments of the special term."

Again, on p. 62:

"We are of opinion that an appeal to the general term from the final order of probate made in the special term, which is not based upon a judicial determination of facts, but merely upon the finding of a jury, of necessity brings into review before the general term all the questions of law," &c.

Once more, on page 63:

"*It is only when that judgment is entered in special term and is followed by judgment of affirmance in the general term, to review which a writ of error is sued out, that the jurisdiction of this Court attaches.*" "And when that court makes an order in general term which, under the statute, may be re-examined here, the appeal therefrom brings up

for review the questions upon which the final judgment really depends, namely, those presented by the bills of exceptions taken at the trial of the issues submitted to the jury."

It seems to me that these citations from the authority invoked by counsel to sustain their theory, that a writ of error may go directly from this Court to the judgment in special term, where the appeal to the general term has been dismissed for want of compliance with the rule requiring the printing of the record, hardly sustain their contention Section 772, Rev. Stat., Dist., is as follows:

"Any party aggrieved by an order, judgment, or decree made or pronounced at any special term may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the supreme court, and upon such appeal the general term shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just."

The authority of the general term is to "affirm, reverse, or modify" the judgment of the special term.

If the appeal is dismissed for failure to comply with the rule providing the mode of bringing up the case, of course the judgment below is not examined at all and is not before the court, and is neither "affirmed, reversed, or modified," but remains intact and undisturbed as a final judgment of the special term. That is the situation of this case.

SUPPOSE THE COURT DENIES THIS MOTION, WHAT THEN?

One thing more: Suppose this Court denies the motion to dismiss the writ of error, what is the situation?

The case takes its place on the docket, there to remain three or four years, until it is reached for trial in its turn,

when the Court would find there was *nothing* to try. The order of dismissal of the appeal by the general term could not be reviewed here, as counsel have admitted, for it did not touch the judgment of the special term at all. The writ of error could not reach that judgment, for it can only go to a judgment of the general term, and there is no such judgment; the time has been wasted; a large estate has been kept unsettled; the legatees, some of whom are already old, as was said by Justice Hagner, in his opinion, may have died in sight of the promised land, and the case will then be found to stand where it does to-day—upon the judgment of the special term admitting the will to probate.

I cannot conceive it possible that this honorable Court will deny the motion to dismiss the writ of error.

S. S. HENKLE,
Counsel for Defendants in Error.

MAR 11 1896
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

CHARLES McINTIRE, Jr., Administrator of Charles McIntire, deceased, Plaintiff in Error,
vs.
EDWIN A. McINTIRE *et al.*, Defendants in Error.
No. 142.

BRIEF FOR PLAINTIFF IN ERROR.

JAREMIAH M. WILSON,
CALDERON CARLISLE,
WM. G. JOHNSON,
Counsel for the Caveator.

Pearson Printing Office, 9th and D sts.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

CHARLES McINTIRE, Jr., Administrator of Charles McIntire, deceased, Plaintiff in Error,
vs.
EDWIN A. McINTIRE *et al.*, Defendants in Error.
No. 142.

STATEMENT OF CASE.

This cause is brought here by writ of error to the Supreme Court of the District of Columbia to review a judgment of that court establishing certain paper writings as the last will and testament of one David McIntire, deceased.

The case arose in the court below upon a plenary proceeding, in the special term for Orphans' Court business, under the provisions of the act of 1798, chapter 101, subchapter 15 of the Acts of the Assembly of Maryland, and under the 16th and 17th sections, which provide as follows:

"16. Whenever either of the parties having a contest in the Orphans' Court shall require, the said court may direct a plenary proceeding, by bill or petition to which there shall be an answer, on oath (or affirmation) and if the party refuses to answer on oath (or affirmation, as the case may require) to any matter alleged in the bill or petition, and proper for the court to decide

upon, the said party may be attached, fined and committed, or his property may be attached and sequestered as aforesaid.

"17. And on such plenary proceeding all the depositions shall be taken in writing and recorded, and in case either party shall require, the court shall direct an issue or issues to be made up and sent to any court of law which may be most convenient under all circumstances for trying the same, and the said issue or issues shall be tried in the said court of law as soon as may be, without any continuance longer than is necessary to procure the attendance of a witness or witnesses, and the power of the court of law and proceedings thereto relative shall be as hereinbefore directed respecting the trial of issues, and the Orphans' Court shall give judgment, or decree upon the bill and answer, or upon bill, answer, depositions or finding of the jury; and in all cases of contest the Orphans' Court may award costs to the party in their opinion entitled thereto, and may compel payment, by attachment of the body and fine, or attachment and sequestration, as aforesaid, of the property."

The petition and amended petition of the caveator and the answers thereto will be found in the record at pages 9 to 25.

Upon these proceedings eight issues were framed (Rec. 38) to be sent to a court of law for trial by a jury. The second and fourth issues relating to the question of testamentary capacity and undue influence were not pressed at the trial by the caveator, and the court upon all the evidence directed the jury peremptorily to return a verdict for the caveatees as to all of the issues. (Rec. 139.)

Exceptions were taken as to the admission and exclusion of evidence, to the refusal of the court to grant certain instructions in behalf of the caveator, and to the granting of the general instruction for the verdict in favor of the caveatees upon all the issues. These exceptions are assigned for error *infra*.

While this cause was pending in the court below Charles McIntire, Sr., the caveator, departed this life, and letters of administration on his estate were issued by the proper

court to his son Charles McIntire, Jr.; whereupon by proper proceedings in the court below the said administrator was admitted a party to the cause in the place and stead of said Charles McIntire, Sr. (Rec. 347–351.) In the following portion of this statement for the sake of convenience the term "caveator" is employed to designate the said Charles McIntire, Sr.

David McIntire, the disposition of whose estate is in controversy in this case, was a bachelor. He had been for the greater part of his life a resident of Philadelphia and a mechanic in that city, came to Washington in about 1864–'5 or '6, and selected for his place of abode the residence of his nephew, Henry McIntire, at whose house he resided for some eight years. He then had living two brothers, Edwin T. McIntire, who resided with his wife and daughters in Philadelphia, and Charles McIntire, the caveator in this case, who, with his wife and sons, resided in Easton, Pennsylvania, about 90 miles from Philadelphia. (Rec. 143–282.)

In 1877 his brother Edwin T. McIntire died, leaving a widow, Mrs. Sarah McIntire, a son, the caveatee Edwin A. McIntire (his other son, Henry, with whom David had lived, having previously died,) and several daughters of whom Martha, Elizabeth (Test,) Emma T., and Adaline survived said David. (Rec. 236–245, 253–281.)

Said Adaline died in 1886, having previously assigned her interest in the estate of David to her mother, Sarah. (Rec. 22.)

Edwin A. McIntire came to Washington in 1863, (Rec. 281,) and his mother and sisters (the other caveatees) in June and July, 1882. (Rec. 237.)

In September, 1880, after having boarded for some years with strangers, David McIntire went to live with his grand niece, Mrs. Annie L. Galliher, who was the eldest child of his nephew, Henry McIntire, with whom he had previously lived, and he remained with her until his death, April 1, 1884. (Rec. 149.)

He was the owner of a large amount of stock in the Pennsylvania Railroad Company, and it was his habit to collect his dividends in person. For this purpose he visited Philadelphia twice a year, stopping on these occasions at a boarding house at which his cousin, Miss Elizabeth Wright, resided. During all this time and until July, 1882, his brother Edwin's widow and daughters, the caveatees, resided in Philadelphia. (Rec. 186–371.)

Early in the morning of April 1, 1884, David McIntire was found dead in the bath-room of Mrs. Galliher's house, and notice was at once sent to Edwin A. McIntire, one of the caveatees, and he arrived at Galliher's house about nine or half-past nine of that morning. Shortly thereafter examination was made of the decedent's effects, all of which were found together in a wooden chest, in his bedroom, at Galliher's house. This was done in the presence of Mrs. Annie L. Galliher, Miss Emma V. McIntire, her sister, William T. Galliher, her husband, and the caveatee, Edwin A. McIntire, who is the uncle of Mrs. Galliher. (Rec. 152, 172.)

Besides his wearing apparel, there was found in the chest his entire personal estate, composed of 734 shares of Pennsylvania railroad stock, of the value of $37,431; 42 shares of Northern Pacific railroad stock of the value of $1,680; United States four per cent. bonds of the value of $2,562; certificate of Northern Pacific railroad scrip of the value of $466.20; German-American Bank certificate for $502.49 (valueless); promissory notes of his brother, Charles McIntire, for $1,350.63 in the aggregate; promissory notes of Ann E. Husted for $240 in the aggregate, and the sum of $18,386 in cash. All these effects were carefully examined by the parties, including the caveatee, Edwin A. McIntire, who, with W. T. Galliher and Miss Emma V. McIntire, each counted all the cash. (Rec. 172–173, 194.)

There were also found in a small tin box, two paper writings, one being a half sheet of legal cap, the other

a full new sheet of legal cap. The half sheet was dated **"January 1, 1880,"** and the full sheet **"Jany. 1, 1884."** The two papers were not attached in any way. (Rec. 174–5.)

Both papers were read aloud in the presence of the four persons above mentioned, and individually examined and read by each. William T. Galliher made a verbatim copy of the half sheet, dated January 1, 1880, and a memorandum of the *items only*, mentioned in the full sheet dated January 1, 1884, but did not attempt to copy it or preserve its form or language. (Rec. 179–183.)

These two papers were then taken by Edwin A. McIntire, who put them in his pocket. (Rec. 298.)

From that time no one had possession or control of or access to said papers except said Edwin A. McIntire and the other caveatees, each and all of whom had actual possession of them, at some time on that day at least. (Rec. 298.)

After the taking of these papers by Edwin A. McIntire, a discussion took place as to the temporary disposition of the assets; several propositions being made by Edwin A. McIntire, all involving the idea of his access to and control over them, all of which were disagreed to by Galliher, who declared himself responsible until letters of administration were granted to some one. He therefore decided to deposit all the assets, except the wearing apparel and a few articles of no intrinsic value, with the Washington Safe Deposit Company, in his own name, until letters of administration should be granted. He then handed to caveatee Edwin A. McIntire, at his request, six hundred dollars in cash from the funds of the estate, to cover expenses of the funeral arrangements, taking his receipt therefor, which is as follows (Rec. 285):

"Washn. D. C., Ap'l 1, '84. I received this day the sum of six hundred dollars to be used to defray funeral expenses, &c., of the late David McIntire.

(Rec. 298.) "E. A. McIntire."

"The above was received from W. T. Galliher from moneys other than those deposited by him in the Safe Deposit Company; said moneys were from the estate of above-named David McIntire.

(Rec. 298.) "E. A. M."

Galliher and E. A. McIntire then went to the Safe Deposit Company's office together, Galliher carrying the assets and McIntire still having in his custody the two papers before referred to. The assets were deposited by Galliher in his own name and the parties separated. (Rec. 285.)

E. A. McIntire then went to his mother's house on Tenth street, between Q and R, and showed the two papers to his mother and sisters some time in the afternoon of April 1, 1884, and each of them had possession of said papers. (Rec. 285.)

This fact, which will be more particularly referred to later on, is important to be noticed and borne in mind, because, in the trial below, it was questioned by the caveatees whether any one not actually participating in the act of spoliation could be subject to the same consequences as would attach to the spoliator himself; and this fact is further important to be remembered for the reason that the contention of the caveator is that the act of spoliation was in the common interest of all the caveatees who had the papers in their joint possession on this occasion, when the act of spoliation for their common benefit was done.

The importance of this fact is further illustrated by the circumstance that the caveatees produced and offered in evidence, against the objection of the caveator, a paper purporting to be a copy of these papers, agreeing with the alterations, which it was, at the trial, admitted appear upon the face of the alleged wills. (Rec. 268.)

At this time the caveatees lived in Washington, while Charles, the caveator, and only brother of the deceased,

lived about 150 miles away, in Easton, Pennsylvania. He had no means of knowing of the death of his brother, of the nature and amount of his estate, whether he had left a will, and what had been done, or would be done, with respect to his estate, except through the caveatees, as he was unknown here and knew no one here, not having been in Washington for many years, and then only for a brief visit. (Rec. 202.)

From this day forth it became and was, as shown by the proof, the concerted purpose and conduct of all the caveatees to mislead and deceive the caveator and keep him in ignorance of all facts material for him to know, and by concealment and active misrepresentation and deception to deter him from making inquiries which, if made, would lead to the truth.

For this purpose the following course was adopted and carried out:

Some time on Tuesday, April 1, 1884, Edwin A. McIntire sent to Charles, the caveator, a *night message* telegram as follows:

"Uncle David died suddenly this morning of paralysis." (Rec. 203.)

According to his own testimony, this could not have been sent until after three o'clock in the evening, and being a night message would not be, and in fact was not, delivered till the next day. At nine P. M. of that day, April 1, 1884, he wrote Charles a postal card containing this statement:

"I telegraphed you *this morning* of the sudden death of Uncle Dave." (Rec. 203.)

This was not only false, as he did not telegraph until some time late that *afternoon*, if not that night, and then by a *night message*, but is also one of the steps, as will be seen later on, taken by E. A. McIntire, in the way of "making testimony" for a possible controversy thereafter,

with a view to showing that he had been prompt to notify the caveator.

The next morning (April 2, 1884), Charles telegraphed E. A. McIntire:

"Telegram not received till this morning; when is the funeral?" (Rec. 203.)

E. A. McIntire telegraphed reply as follows:

"Funeral at three o'clock to-morrow, Thursday, P. M." (Rec. 203.)

On the same day Charles wrote that he had received the second telegram and postal at about the same time, but had no way to get to Washington in time for the funeral. (Rec. 114.)

The next thing done by E. A. McIntire was to write to Charles, the caveator, a letter (Rec. 104), dated April 3, 1884, but which he did not mail till April 4, three P. M., and which did not reach Easton till Saturday, April 5, eleven A. M. (Rec. 106.) In that letter he tells Charles that he intends to have the remains interred in Philadelphia, and promises to advise him as to the time. In this letter, however, he gives no information as to the estate of decedent or proceedings for the establishment of the alleged will, the only reference to that subject being contained in the following words (Rec. 105):

"Uncle Dave left a will *devising his property to his nephews and nieces*, but appointing no executor. Cousin Charley and I are the only nephews now living. I do not remember which of us is the older, but as I am a resident here and *can easily procure bonds*, perhaps a settlement of matters could be made more speedily if I should qualify as administrator. *I hope, however, you would write me your wishes in the matter.*"

Without waiting, however, to hear what his wishes were, E. A. McIntire, on the 8th of April,—only two days (one being Sunday) having intervened since the receipt

by Charles of this letter, asking Charles to advise him of his wishes—appeared before the Register of Wills of the District of Columbia and presented two papers pasted together, one bearing an obviously altered date of January **7th,** 1880, and the other bearing an obviously altered date of January 1, 1880. To these he attached the affidavit for probate, which was signed and sworn to by himself, and which he procured to be signed and sworn to by his two nieces Annie L. Galliher and Emma V. McIntire, and Wm. T. Galliher, (the husband of Mrs. Galliher,) they believing them to be the same papers which were found in David McIntire's chest on the morning of April 1, 1884.

At his instance these papers were, on said 8th day of April, A. D. 1884, admitted to probate as the last will of David McIntire.

No notice whatever was given to Charles, the caveator, that this application would be made.

On the same day (April 8th, 1884) Charles McIntire, not knowing that anything had been or would be done, and acting upon the invitation contained in the letter of E. A. McIntire, in which he says "I hope, however, you would write me your wishes in the matter," wrote to E. A. McIntire, stating that he had not written the day before because he was sick, and stating his "wishes in the matter" thus: "Will you please send me a copy of the will, and on receipt will answer by return mail so that brother's effects can be closed soon as you state." (Rec. 114–115.)

Having received this letter, instead of advising Charles McIntire of what had been done or what was contemplated, E. A. McIntire again proceeded further to mislead Charles, and at the same time manufacture evidence for use in the event of a controversy. This was done by writing the letter of April 9, 1884, (Rec. 103,) but which was not mailed until the 12th, and did not reach Easton until the 13th, (Rec. 104,) and that day being Sunday the

letter was, in consequence, not delivered until Monday, the 14th, on which day the caveator was in Philadelphia in response to a telegram from E. A. McIntire to be present at the interment of David's remains. The letter was not received by the caveator until his return to Easton, April 15, 1884.

In the meantime, and on the 11th of April, 1884, two days after the *date* of said letter, but one day before it was actually *mailed*, Edwin A. McIntire and his sisters, the caveatees in this case, presented the petition for letters of administration upon David's estate, set out at pages 1 and 2 of the record.

This petition, written by Edwin A. McIntire and signed and sworn to by Martha McIntire, another of the caveatees, and adopted and signed by all the caveatees, who state they have knowledge of its contents and request the court to act upon it, was and is false and fraudulent in many particulars, of the utmost materiality and importance, and was known to be so by every party whose name appears thereon, when written, when signed and when presented to and acted upon by the court.

In paragraph three of said petition, intended to deceive the court as to who were the next of kin entitled to notice of the application, it is stated that the decedent "left him surviving, *as his heir at law*, the parties named in his will, to wit: Martha McIntire, (your petitioner,) Mrs. Elizabeth McIntire Test, Edwin A. McIntire, Adaline McIntire, and Emma T. McIntire, the children of his older brother, the late E. T. McIntire and Charles McIntire, Jr., the son of the younger brother of the deceased." (Rec. 1.)

At this time every one of the caveatees knew that statement to be false. They all knew that the nearest of kin to the decedent was his only brother Charles, and that he was then living; and the writer of that falsehood, Edwin A. McIntire, *had actually been in communication with him and had received a letter from him two days before.*

In the fifth paragraph of the petition, he writes, with his own hand, for the express purpose of misleading the Orphans' Court and others in interest into the belief that the estate was inconsiderable and unimportant, the further falsehood, which all the others adopt, viz., "that your petitioner *believes* the deceased left *some* property, the *amount* and *description* of which *she has not been able to ascertain.*" (Rec. 1.) In point of fact, however, as hereinbefore detailed, on the morning of the first of April, A. D. 1884, *ten days before writing this statement*, he had gone over the entire assets in detail, had seen everything, and counted the money and seen it all deposited in the safe deposit vault before the day was out. On that same day he told Martha, who signs and swears to this false and misleading statement, and also all the other caveatees, of the vast amount of properly left by decedent, and they all, according to caveatee's testimony, not only knew and were "able to ascertain" the "amount and description" of the estate, but they all thought that he had left even *more* than that, and yet, ten days later, filed their statement representing that they "*believed*" that decedent left "*some* property, the nature and description of which they had not been able to ascertain." As a further means of securing the granting of letters to this caveatee, they also inserted in said petition the false statement that said Edwin A. McIntire had "already made himself responsible for the debts and funeral expenses of the deceased." Yet, at the moment of writing that statement, the caveatee, Edwin A. McIntire, the writer thereof, had, and for ten days had had, six hundred dollars in his possession for this very purpose, and had so receipted as hereinbefore shown.

Having thus mislead the court, as to who were the next of kin entitled to notice, and as to the importance of the estate, and, by these frauds upon the court, secured the issuance of letters of administration without notice to

Charles, the only surviving brother, E. A. McIntire, the next day, the 12th, mailed to the caveator the letter dated the ninth, for the obvious purpose of making it appear to Charles that nothing had been done, and also by way of manufacturing evidence in advance to show that due notice had been given to Charles before the application for letters was made. In order to secure the *ex parte* management of affairs and prevent the interference of, or inquiries by others, care was taken always to impress upon all persons that the estate was trifling in value, and also to lead to the belief that due notice would be given before any action could be taken for the settlement of the estate.

With this end in view the caveator was told, in Philadelphia, on the 14th of April, by one of the caveatees (Edwin A. McIntire), when he asked if David had not left enough to give him a decent burial, that he, the caveatee, was paying the funeral expenses out of his own means, and thereby leading caveator to believe that the estate was very small. (Rec. 206.)

In the letter of the ninth, mailed on the 12th, to the caveator, he encloses a waiver of citation to be signed by Charles McIntire, Jr., and says, in regard thereto, "the signing of this paper is suggested merely to avoid the necessity of a *publication in the Easton papers*, requiring Charles McIntire, Jr., to *take notice* that such application had been made by Martha McIntire," &c., (Rec. 103, 104,) thereby leading him to believe that nothing could or would be done until the signing of such paper or the appearing of such notice in the Easton papers. It is needless to remark that no such notice ever appeared in the Easton papers, nor was any such publication required, as the writer, E. A. McIntire, well knew.

Having, by these deceptive means, secured the probate of the will and the issuance of letters without an opportunity on the part of the caveator to be heard, and having lulled him into a sense of security by holding out to

him the insignificance of the estate, and the idea that a publication would be made in the Easton papers before anything would be done, he next proceeded to secure possession of the estate, all of which was turned over to him, upon demand, by William T. Galliher, for which he gave the itemized receipt, in his own handwriting, set out on p. 108 of the record.

Having gotten the alleged will probated on the 8th, letters issued on the 11th, and the estate in his possession on the 18th, he writes to the caveator on April 21, (three days after getting possession of the assets,) in reference to the waiver of notice, previously sent, as follows, (Rec. 106:)

"If the doctor [Charles, Jr.] has no objection to signing the paper I sent you, please have it forwarded to me this week. I do this *only to save expense.* If he objects to signing, THEN I MUST ADVERTISE."

And this false, misleading card was sent ten days after the matter to which it related, to wit, application for administration had been concluded by actual issuance of letters to the very man who wrote the card, and who was at the moment of writing, by virtue of those very letters, in actual possession of the entire estate, and had been so possessed for three days.

On the 24th of April he wrote the letter, on page 107 of the record, addressed to Charles, Jr., wherein he says: "Among THE FEW THINGS in his chest [the decedent's] which were not mentioned in the will [an alleged copy of which he had sent to the caveator on the 12th, and which he received on the 15th] was a *small spy-glass or telescope,*" but not one word as to the large personal estate amounting to over $63,000, which was "among the few things in his chest," but which was "not mentioned in the will;" and, then, upon the 28th of April, he wrote the letter on page 108 of the record, also to Charles, Jr., endeavoring to dissuade him from employing counsel, in

the following language: "I have announced in court that, inasmuch as two of the heirs (my sister Lizzie and yourself) are non-residents, I propose to *take no step* without *first obtaining the sanction of the court.* I did this to *avoid the necessity of either she or you employing attorneys,* yet of course it is *your privilege to retain one however much I may think it unnecessary.*" The motives and objects of this course of conduct are too apparent to require comment.

From this time the caveatee, Edwin A. McIntire, remained in possession of all the assets, and never gave any information to the caveator as to the amount and character thereof, save the one statement about the "spy-glass" and "gun," but did tell the caveator that David had not left sufficient to bury him decently. (Rec. 206.) The caveator, however, having discovered that the estate was large, and that these representations were wholly false, and that litigation had ensued by reason thereof, proceeded to the investigation of all matters pertaining to the estate, and it was then ascertained by the caveator for the first time that the papers probated as the last will were not genuine. That they were not the same which were found in the testator's chest, or if so, that they had been so altered and mutilated by the caveatees as to constitute, if anything, mere remnants of the testamentary act, the latest and most material portions of which they had suppressed and destroyed.

As before stated, there were found among the decedent's effects two paper writings, one a half sheet, dated January 1, 1880, the other a full sheet, dated January 1, 1884. This latter sheet when found contained, among other things, a bequest of "my glasses to them who will have them," or similar words, (Rec. 175,) which do not appear on either of the papers produced by the caveatees.

The papers presented for probate and probated, under the circumstances hereinbefore detailed, are a half sheet,

dated January 7, 1880, no such paper having been found among the decedent's effects, and $\frac{1}{8}$th of a sheet, dated January 1, 1880, (Rec. 339–340,) and none such was found among the decedent's effects.

One of two things was, therefore, absolutely necessary to produce these papers which the caveatees offer as the last will. Either they are fabrications in imitation of the papers found—those papers being wholly suppressed—or they are the original papers altered and mutilated by the parties into whose possession they went after the death of David McIntire.

If they be fabrications, then ends this controversy, and they cannot stand as a will. If they be the originals, mutilated, then it becomes material to observe in what particulars they have been mutilated and the effect of such mutilations.

Assuming them to be the mutilated originals and not fabrications, the changes consist—

First. In changing the paper dated January 1, 1880, to January 7, 1880, giving it a date six days later than it had from the hand of the decedent.

Second. In changing words "of the city of" in said paper, so as to read "of this city."

Third. In changing the paper dated January 1, 1884, to January 1, 1880, thereby giving it a date four years earlier than that given to it by the decedent.

Fourth. In tearing off and utterly suppressing the concluding and last one-eighth portion of said ~~last~~ last paper, dated, originally, January 1, 1884.

The effect of these changes is, separately, to give a later date to the one paper and import therein a declaration of domicil not made by the writer; to give a much earlier date to the other paper and wholly to suppress a part of its contents.

Taken together the effect is to transpose the two papers

in the order of time, making the one which was four years later than the other, now appear to be six days earlier and utterly destroying the last or concluding portion of the latest paper, and thereby making the paper which was first in time override and control the one which was four years later.

The reasons and motives for producing these fictitious papers or indulging in the mutilations, alterations and suppressions above detailed are apparent.

By the terms of the paper, now dated January 7, 1880, and which, if not a fabrication *in toto*, is altered to that date from January 1, 1880, and which it is sought by the caveatees to have set up as the last will of David McIntire, the caveatees would receive substantially all the estate in exactly equal shares. But there was found in his chest on the day of his death another paper, dated January 1, 1884, which, as before shown, *went into the possession and control of all of the caveatees on that day.*

It is clearly proven, however, that between January, 1880, and January, 1884, whatever may be supposed to have been the personal feelings of David toward the cavatees prior to that date, his relations with them were, in those years, not friendly, and he considered their conduct towards him inhospitable. He told his grand niece, Mrs. Galliher, that he had not stopped at their house in Philadelphia, when he went to that city, because he was not well treated there. That the family, one by one, would get up and leave the room and leave him alone. That on another occasion they gave him an uncomfortable old lounge to sleep on when they had better accommodations, and some of the cavatees treated him offensively at Mrs. Galliher's house so that he left the room in anger. (Rec. 150, 151.)

The caveatees testify to great intimacy with him, and to his daily visits to them; but there are facts not disputed or controvertible which disprove these pretensions.

When their father died in 1877, he was not at the funeral, though Charles, the caveator, was. Until the summer of 1882 they lived in Philadelphia, while he lived in Washington, and he only went to Philadelphia about twice a year. He then stopped with his cousin, Miss Wright, and not with the caveatees. On *August* **15, 1880,** when he was nearly sixty-eight years of age, and was then boarding, not with relatives, but strangers, he wrote to her as follows (Rec. 102): "I have come to the conclusion to pay a visit to you about the fifteenth of September, providing I can get a place to stop at three or four days; if not, I will arrive in the city about *three or four in the morning, run around all day,* and leave the next *night about eleven o'clock. To stop up at Eighth street they are grumpy or grumous, which makes it rather unpleasant.*" The family at "Eighth street" were the caveatees.

This old man, nearly seventy years of age, declares in his own carefully written letter that, rather than stop at the house of the caveatees, he will arrive at three or four in the morning, run around all day, and leave at eleven o'clock at night, because they are "grumpy and grumous, which makes it rather unpleasant;" and he did go to Philadelphia on the fifteenth, and stay with his cousin, Miss Wright, in accordance with his letter. (Rec. 190.)

In July, 1882, the caveatees came to Washington. Six months later, in December, 1882, David McIntire writes to Miss Wright again and tells her that they are here. But he does not say that he visits them daily, or that he is pleased to have them in the same city; on the contrary, he writes thus (Rec. 103): "Sarah and the gals are down here. *The girls will not tell me where they live.* M. (Martha) tell me they live on the Boundary. E. (Emma T.) wants to know if I want to see the house or the people in it. Sarah has not showed herself." And he told Miss Wright that he had not been to see them, and that they wouldn't

tell him where they lived, and told Mrs. Galliher the same.

This letter having been written in December, 1882, was written three years (about) *after* January 1, 1880, and only a year *before* January 1, 1884, and exhibits the same want of friendliness shown in the letter of August 15, 1880, a little over eight months after January 1, 1880.

In that same month, December, 1882, he met his brother, the caveator, in Philadelphia, by appointment. They were together a long time. He spoke happily of it to Miss Wright, and afterwards to Mrs. Galliher, (Rec. 150, 187, 201–202,) and on January 1, 1884, in this state of mind towards the caveatees, he made a will, which in April, 1884, went into the hands of the caveatees a full complete sheet, dated January 1, 1884, which paper, in its integrity and entirety, has never since reappeared. Where is it? Who has it? Who altered and mutilated it? Where is the missing part? What did it contain? are all questions which the caveatees alone can answer, and yet decline to do so, although, by their conduct, they have put it out of the power of the caveator, by direct evidence, to enlighten the court, or disclose the truth.

Attempt is made by the caveatees to show that there was a hostile feeling existing between David and Charles about an indebtedness existing between them. But, from the proof, it appears that the hostile feelings and expressions emanated from the caveatees, and that they were bitter in their attacks upon him, which bitterness is clearly shown in their expressions on the witness stand. (Rec. 239–247, 255, 256–259.)

In connection with this, some brief reference to that indebtedness becomes appropriate.

Charles, the caveator, and David had grown up together. David was four years older than Charles. In 1842, when Charles was a young man of about twenty-six, he borrowed from his elder brother, David, a sum of

money, and a few years later he borrowed two or three hundred dollars more. Upon this sum Charles paid his brother David interest until 1850, when Charles was burned out, and lost all he had by the fire. (Rec. 113, 210.)

In December, 1853, he wrote David (Rec. 113) a frank acknowledgment of his indebtedness and a straightforward statement of his situation, offering his notes, which David accepted. Being still in straightened circumstances, he wrote, in December, 1854, (Rec. 114) to his brother David, asking indulgence, but offering to pay if his brother insisted upon it.

The caveatees were continually annoying Charles about this debt, and he twice offered to pay David, stating to him that his brother's family (who, as one of the caveatees testifies, were "all down on Charley") had been annoying him about it, to which David replied that when he "wanted the money he would ask for it," and "if they will attend to their own business I will attend to mine." (Rec. 210.)

From the time of the maturity of the notes to the day of his death, David never asked for the money, and Charles was, during all said time, financially responsible, he owning real estate out of which a judgment against him for the amount could at any time have been collected. (Rec. 210, 310.)

David's cousin, Miss Wright, at whose home he stayed in Philadelphia whenever he visited there, from 1879 to 1884, and with whom he corresponded, says (Rec. 187–188) he always spoke kindly of Charles, and never complained of him or spoke of his owing money to him, and never mentioned the subject but once, and then not in anger with Charles, but seemed nettled and affronted because the caveatees had spoken to him about it. She never heard of this debt except from the caveatees' family. David never spoke of it to Mr. or Mrs. Galliher, or her

sister at whose house he lived for the last three years and a half of his life. David did speak of the caveatees to Mrs. Galliher, and told her that he didn't want to go to see them because he didn't like them.

Before Charles went to Easton, David boarded with him for a long time. He visited him at Easton in 1867 or '8, and remained there a week, and there was no unpleasantness between them. (Rec. 213, 309–310.)

The paper writings set up by the caveatees in this case as the will of David McIntire have no subscribing witness, and no witness testifies that they were written by him. *It was not at the trial and it is not now admitted that these papers are in the handwriting of David McIntire.* The only evidence in support of them is the *opinion* of witnesses claiming to be familiar with his handwriting that they are in his handwriting, and while *one* witness for the caveatees says that they are the same papers found in decedent's chest on April 1, 1884, *three* witnesses who were present when the papers were taken from the box negative that statement by showing that the papers taken from the box were different in essential particulars from these papers. (Rec. 152–153, 174, 194–195.)

Special attention has already been asked to the fact, that on the day of the death all the caveatees had possession of the papers found in the box. That fact, together with other facts proved in the case, is full of significance, and it is confidentially asserted that all of the evidence (both of caveator and caveatees,) and all proper inferences deducible therefrom, show that the spoliation of said papers was done by Edwin A. McIntire at the house of the caveatees and in their presence.

E. A. McIntire got the two papers on the morning of April 1, 1884, and put them in his pocket. He and the Gallihers remained together at the Gallihers' house, 469 H street southwest, *till about one o'clock*, when he left there

with Galliher in his, E. A. McIntire's, buggy, and went to the Safe Deposit Company's office, on Pennsylvania avenue, between 9th and 10th, where he *introduced Galliher, and they attended to the depositing of the securities.* From there he drove to the house of his sisters, the other caveatees, on Tenth between Q and R, and arrived there *about one o'clock, possibly half-past one.* He then announced the death of David, and showed them the will, and Emma copied it *at that time.* (Rec. 268, 284, 285.) The alleged copy agrees with the papers as now presented.

The character of the alterations, the care required to make them, the necessary use of a knife or eraser and ink, makes it physically impossible that he could have made them in the presence of the Gallihers at their house, or while driving in a buggy with Galliher to the Safe Deposit Company, or while driving alone in a buggy to 10th and Q streets, and yet *have lost no time,* and arrived there about one, *possibly half-past one.* (Rec. 285.)

These physical facts, together with the testimony, make it demonstrable that the spoilation was done in the *presence of all the caveatees* (except possibly Mrs. Test), with their connivance and consent in the house on Tenth street, and that the alleged copy produced by Emma T. McIntire was made for the purpose of manufacturing testimony to rebut the fact of these alterations, should they be detected. Their participation in the other wrongful and deceptive acts perpetrated shows them to have been animated with the same fraudulent design which prompted Edwin A. McIntire to do the several fraudulent acts complained of, all of which, it is apparent, were done in the equal and common interest of all the caveatees.

The foregoing statement fairly presents the case *actually proved* by the caveator at the trial; but the caveator was

prepared with evidence in connection with the facts hereinbefore detailed, which he duly offered, tending to prove other facts and circumstances, which evidence, upon objection, was excluded by the court, and exception duly taken.

The evidence offered consists of certain declarations of one of the caveatees, Edwin A. McIntire, made in the course of, and in actual connection with the business of this estate; the record and proceedings in the court below at its special term for Orphans' Court business, including the answers therein of all the caveatees; the inventory (comprised in the offer just mentioned, but again offered separately) filed by the caveatee, Edwin A. McIntire; and the record and proceedings in equity cause 9,330, of the dockets of the Supreme Court of the District of Columbia being the bill filed against the caveatee, Edwin A. McIntire. These offers are all set out in the several bills of exceptions, and more fully appear in the transcript of the trial below, forming a part of said bills of exception.

The facts involved in the offers are most of them matters of record, and it is material to note what they would have added to the case made by the evidence admitted. It will be remembered that the notification of the death of David to Charles was by a *night message* sent some time on the first of April, certainly after three o'clock, and followed up by the postal containing the false statement that he had telegraphed "*this morning.*"

The answer of Elizabeth Test to the caveat, which caveator desired to offer in evidence, both before and after she had testified, shows the different policy of caveatee, E. A. McIntire, in communicating the news of David's death to her, his co-caveatee, residing in Philadelphia. In that answer, written by said E. A. McIntire, she says (Rec. 23): "That on the *first day of April*, 1884, she received a telegram from her brother, Edwin A. McIntire,

announcing the death of their uncle, David McIntire, and that within a few hours thereafter she took the train from Philadelphia to Washington."

All the caveatees having been thus gotten together while the caveator was being kept away by the misrepresentations and deceptions practiced upon him as hereinbefore detailed, E. A. McIntire, in addition to writing and filing the false petition for letters of administration hereinbefore described, in the presence and hearing of all the other caveatees, presented to the court for its signature, the order granting to him letters of administration upon said estate. This order, in his own handwriting, designed to confirm his previous misconduct and furnish record evidence in his behalf in the event of subsequent litigation, contains, among others, this false recital of fact, to wit (Rec. 2): "It further appearing that the heirs at law had full knowledge that the application for said letters would be made, on the 11th day of April;" while, as hereinbefore shown, the only knowledge that said application would be made, which was given to the caveator, was that embraced in the letter dated April 9, but not mailed until April 12, and which, as hereinbefore shown, he knew the caveator could not receive until after the 14th, while the only communication to Charles McIntire, Jr., on the subject, was not mailed until April 24, 1884.

In the answer of the caveatee, Elizabeth McIntire Test, (before referred to and in the handwriting of the said E. A. McIntire,) she shows *how* it *appeared to the court* that all the "heirs at law had knowledge of this application." After detailing the actual presence in the court on that occasion of all the caveatees, she says (Rec. 23): "Respondent further says, that at said session of court her brother, E. A. McIntire, in her hearing, *advised the court that he had written to Charles McIntire of Easton, Penna.*, the petitioner, and *showed the court a letter from said Charles McIntire asking for a copy of the will* of the deceased."

As already shown, that letter of the caveator was written on the 8th of April, the day before the letter of the caveatee of the 9th, referring to the application for administration was written, and four days before it was actually mailed, and in response to the letter of April 3, mailed on April 4, which not only contains not one word upon the subject, but, on the contrary, asks Charles to advise him of his wishes in the matter.

Having secured the entire estate in his possession by these means, hereinbefore shown, the said caveatee Edwin A. McIntire further prosecuted this course of deception and misrepresentation by subseqently representing to John F. Hanna, an attorney at law, then of counsel for Charles McIntire, Jr., the son of the caveator, that the estate was of trifling value, (Rec. 337,) and as late as January 7, 1885, said to another of his counsel that he had only recently discovered that David had left an estate of any considerable amount, and his declaration made to the driver of the wagon in which David's body was conveyed to the Baltimore and Ohio depot from Glenwood Cemetery, which the caveator offered to prove by the driver, went so far as to assert that David was a poor man, had left nothing, and that he (E. A. McIntire) was paying the expenses as a matter of charity out of his own pocket, when he had in that pocket $600 of David's money since the day of his death, and knew all David had left besides. (Rec. 307.)

On the 26th of January, 1885, he filed an inventory for the first time, under pressure and insistence of counsel, in which he swore that the same was a full, true and complete inventory of all the goods, chattels and personal estate of the said David McIntire, which had come to his possession, and of which he had knowledge; that he knew of no concealment by any person whomsoever, and that if he should suspect any to be, he would acquaint the court therewith. (Rec. 344–345.)

In point of fact this oath was absolutely and unqualifiedly false.

In his said inventory he charges himself with the sum of $5,845 in cash, $1,468 of which he collected in June, 1884, and $1,101 in December, 1884, leaving a balance of $2,276, as the amount on hand at the date of the death of the said David McIntire. (Rec. 345.)

By the uncontradicted testimony of three witnesses, and of his own receipt, *the correctness of which he does not deny*, he received from Galliher on April 18, 1884, $18,386, and with that money actually in his possession, he deliberately conceals $16,110 thereof, and files, for the purpose of deceiving the court and parties in interest, the wilfully false oath above referred to. (Rec. 108, 152, 173, 194.)

As soon as this fraud was detected, an investigation was had, which led to the filing of the bill in equity cause, No. 9330, against said caveatee, Edwin A. McIntire, hereinbefore mentioned, to prevent further depredation upon the estate, which resulted in a decree in that court by the provisions of which a consent decree was had in the court below at its special term for Orphans' Court business, by virtue whereof, said caveatee, after admitting his liability for part of said sum, consented to submit the question of his liability for the balance, $10,000, to arbitration. (Rec. 5–6.)

Before any proof was taken, however, by either party, said Edwin A. McIntire directed said arbitrators, by his written direction to that effect, to make an award against him for the sum of said $10,000 with interest from April 18, 1884, and filed therewith the receipts of his four sisters, the other co-caveatees, for $2,500 each, in satisfaction of the amount, and he and they must be conclusively presumed to be now in the possession and enjoyment of those ill-gotten gains. (Rec. 7–8.)

From the first day of April, 1884, until the seventh day of January, 1885, he concealed the fact of the amount and

character of the assets from the caveator, though all had been in his possession since April 18, 1884, and when he did disclose for the first time that there was a substantial estate, he lied about it, as above shown, and confirmed his falsehood with a solemn and sweeping oath attached to his inventory filed nineteen days later.

In the meantime the only information given to the caveator was the communication to his son about the "spy-glass" and "gun," both of which he generously offers to Charles under a liberal construction of a latent ambiguity in the alleged will, which ambiguity he generously attributes to his own facetiousness, as shown by his letter of April 24, (Rec. 107,) wherein he says:

"DEAR COUSIN:

"In addition to the will made by Uncle Dave was a memorandum or codicil wherein he devised to you 'the telescope gun.'

* * * * * * *

"The only gun I ever knew Uncle Dave to own was a single-barrel shotgun which he bought many years ago. I used to call it a 'telescope gun' merely out of fun, and he sometimes laughingly spoke of it by that name. I have not seen it since his demise, although I am told it has been for a few years at a grocer's where Uncle Dave was acquainted. I shall send it to you as soon as I get possession of it.

"Among the *few things* in his chest which were not mentioned in the will was a small spy-glass or *telescope*, and as it *may have been the intention* to give you the 'telescope' *and* 'the gun,' although neither are of much value, I have in separating the things followed the wishes of uncle as nearly as possible, hence I send you by express to-day the telescope, pocket-knife, Webster's dictionary, and pocket-book." * * *

In this concealment of the assets and failure to file an inventory, all the other caveatees co-operated, and, according to their answers to the caveat expressly advised such concealment, the pretext for so doing being herein stated

to be the difficulty of procuring a bond for so large an estate, notwithstanding he had written to the caveator, in the tardily mailed letter of April 3, 1884, as a reason for his acting as administrator, that he was "*a resident, and can easily procure bonds,*" and well knowing at that time the amount of the estate. (Rec. 21, 104.)

After these developments Charles McIntire, the caveator, "lost confidence," the caveat was filed, and upon appeal to the general term of the Supreme Court of the District of Columbia the issues which he presented and which were allowed at the special term for Orphans' Court business were approved, and were twice offered for trial before a jury. (Rec. 36–39–82.)

The position of the caveatees, therefore, is, that after having gotten possession of the papers found in the decedent's chest in the manner described; after having, in connection with the various grossly, fraudulent, false and misleading acts hereinbefore detailed, secured possession and control of the estate and concealed and misappropriated $16,110 thereof, and having actually suppressed the real papers found in the decedent's possession, they now have the right, notwithstanding such conduct, to retain substantially the entire estate and rely for their justification upon the remnants of the now false and mutilated papers as a muniment of title, by force of which they claim utterly to defeat the statutory right of the next of kin, and only brother of the decedent, and thus, by this wrongful and fraudulent alteration, mutilation and suppression, fraudulently to give effect to the first paper, notwithstanding the despoiled and suppressed provisions of the one written four years later, by a testator whose feelings and attitude towards these claimants was, between 1880 and 1885, utterly inconsistent with the feelings and attitude of one who would have left, as a testamentary disposition, the paper now dated January 7, 1880.

As hereinbefore stated, the second and fourth issues were not pressed by the caveator at the trial in the court below.

The first, third and fifth issues go to the genuineness and authenticity of the alleged wills.

The sixth, seventh and eighth go more particularly to the mutilations and their effect.

From the foregoing statement it appears that the proof submitted by the caveatees was wholly opinion testimony as to handwriting. (Rec. 142, 143, 148.) That testimony is not only contradicted by the caveator by similar testimony, but it is proved that no one knew of any testamentary writing of the decedent other than the writings found in the chest on April 1, 1884, which were committed to the possession of the caveatees, and that those identical papers have never been produced, and that other and different papers, variant in material respects from those so found and committed to the possession of the caveatees, have been produced and relied upon by them.

Assuming that the same papers have been produced the caveator has proved, by three uncontradicted witnesses, that they have been mutilated and in part suppressed.

The character of the changes, the transposition of the papers in order of time, whereby the one which was four years latest in time is made six days earlier, and the destruction of the concluding portion, together with the effect of the earlier paper upon the caveatees, discloses that, if wilfully done, there could be but one object in doing it, to wit, to avoid the revocation of the earlier paper by the later, which raises the inference that it did so operate.

The alterations, mutilations and suppressions, were not innocently or accidentally done.

The physical evidence given by the paper itself shows

that they were carefully and designedly done with every available art and device thrown about them to avoid detection, while the caveatees absolutely deny that they have been altered.

The contemporaneous conduct of all the caveatees in respect to the papers and the other matters relating to the estate shows a concerted, wicked and fraudulent intent in all, executed by wrongful and fraudulent acts by each, in aid and execution of the common purpose.

It was in this state of the evidence that the court below, as hereinbefore stated, instructed the jury peremptorily that upon the whole evidence they should return a verdict for the caveatees upon all the issues.

It is proper to say, however, that the trial justice, in giving this instruction, did so in great doubt, and for the express purpose, as stated by him, of having the questions of law presented by the case determined by the court below in general term. (Rec. 320–321.)

The questions, sharply presented by the record, are these:

I.

The caveator denies that the papers presented were the last will and testament of David McIntire. The caveatees insist that they are. Whether these papers were in the handwriting of David McIntire was a question before the court and jury in the trial of this case. If they were not in his handwriting they were not his last will and testament, because there was no evidence or pretense of evidence that they were written by his authority or direction.

II.

If they were in his handwriting the caveator contended that they had been altered in date so as to make one which was written in point of fact on January 1, 1880,

and which contained a full disposition of his estate, appear to be made January 7, 1880, and the date of the other, which, upon its face, even as now mutilated, bears evidence of the intent of the writer, by that paper, to dispose of his entire estate, had been changed so as to make it appear to have been dated January 1, 1880, when, in point of fact, it was written January 1, 1884, and this paper of latest date, which had gone into the hands of the caveatees a full sheet, had come out only seven-eighths of a sheet, the last one-eighth being torn off. If these papers had been so altered as to change their relation to each other and the effect of both of them, they were not the last will of David McIntire.

It is confidently submitted that both of these questions made it necessary to submit the case to the jury, and that neither question could be decided by the court.

Resumé.

The case of the caveator, on the facts, may be summed up as follows:

1. There is no dispute that there were two testamentary papers found in David's chest. Three witnesses who saw them on the morning of David's death say that one was dated **January 1, 1880,** and the other **January 1, 1884.** The papers as offered are now dated **January 7, 1880,** instead of January **1, 1880,** and **January 1, 1880,** instead of January **1, 1884.**

The only remaining witness who saw them on that morning, E. A. McIntire, testified in the two trials below that the dates now appearing were the dates on the papers when found; that they have not been altered since the death of David McIntire. But we have other testimony from this same witness in his own handwriting dated April 24, 1884, (Rec. 107,) in which he, a lawyer, describes the paper now dated January 1, 1880, as follows:

"In *addition* to the will made by Uncle David was a memorandum OR CODICIL, wherein he devised to you [Charles, Jr.] the telescope gun and one pocket knife, Webster's dictionary and pocket-book."

2. After these papers were seen by the four witnesses on April 1, 1884, they went into the pocket of E. A. McIntire and remained there certainly until he left the Gallihers' house, and had gone with Mr. Galliher to the Safe Deposit Company, and had left Mr. Galliher there; after that we are dependent wholly on the testimony of the caveatees; but it appears that he went directly from the Safe Deposit Company to the house of his sisters, the other caveatees. Then, by their own testimony, we have all the caveatees assembled, except, possibly, Mrs. Test, who, if not then present, must, by her own testimony, have been then on the way and certainly arrived on that day. We have the two testamentary papers, presumably in the condition in which Mr. and Mrs. Galliher and Miss E. V. McIntire saw them, and we have the modern devices of pens, ink and paper, and the motive as old as humanity almost, "*Auri sacra fames, quid non mortalia pectora cogis.*"

3. Mrs. Test was actually, or was soon to be on the way to join the caveatees in the inception, as she has certainly joined in the succeeding stages of this business. Charles, Jr., the only other beneficiary of the first paper, who, when his father was alive, stood with him against the caveatees, and now that he is dead, stands in his representative capacity as administrator, in his place, was excluded from this inner circle for the same reason that his father was. We have, therefore, on the very day of the death of the testator, in and about the very matter in controversy, all the caveatees banded together on the one side against the caveator, and his son on the other. While Mrs. Test is promptly summoned so that she arrives the same day, the caveator Charles is disposed of by a night message

and a postal, neither of which could or did reach him till the next day.

4. While the caveatee has $600 of the testator's money in his pocket, and knows of the existence of $18,386 cash, in which knowledge his sisters, the other caveatees, share, he, who at every stage acts for the others, represents to the probate court that he has made himself responsible for the debts and funeral expenses of the deceased; to the driver of a furniture wagon that his uncle left nothing, and that he is paying the expenses out of his own pocket as a matter of charity; to his Uncle Charles, the caveator, that his Uncle David left not sufficient for his burial; and after the sun has risen and set day by day for nine long months, he tells the late John F. Hanna, of counsel for caveator, that the estate is inconsiderable and trifling, and repeats the same thing to another counsel of caveator.

5. But he had, in his own handwriting, the petition which he procured to be sworn to by his sister Martha and signed by all the caveatees, after he had handled the securities and seen and counted the money, and when, if he had forgotten the amount and description of the estate, he could easily have ascertained it from the memorandum of Mr. Galliher, or by viewing the securities and cash in the safe deposit—in this petition he states that the deceased left *some personal estate, the amount and character of which he has been unable to ascertain.* And when later he is forced to file an inventory he deliberately conceals the existence of $16,110, for he had admitted on April 18 the receipt of $18,386 from Mr. Galliher.

And when he is charged in a court of conscience with being a dishonest man—a thief—he does not answer the bill exhibited against him in a public tribunal, but secures by stipulation a private court, and before the private court he does not show he is not a thief—or show anything—but he agrees with the counsel of his accuser to admit his responsibility for the whole amount of the

stolen money—and accounts in the probate court for part in cash and *for ten thousand dollars in the receipts of his four sisters.* (Rec. 5, 6, 7, 8, 324–343.)

6. We have then all the caveatees except Charles, who has from the beginning stood with his father, the caveator, banded together from the 1st day of April, when the testator died, to the framing of these issues—

1st. In the room with pen, ink and paper, on April 1, 1884, with the two testamentary papers in their joint possession.

2d. In the probate court, in the false petition, on the 11th day of April, 1884.

3d. In the probate court on the 7th day of April, 1885, in adopting and making good the concealment and misappropriation of $10,000 of this estate, by the admissions of E. A. McIntire and the receipts of his four sisters.

7. We have the two papers which, if admitted as the last will and testament of David in their present shape, will give the bulk of the estate to E. A. McIntire and family. But the caveator contended, and it was for a jury to say whether he proved, that the paper now dated January **7,** 1880, was dated January **1,** 1880; and that the paper now dated January 1, 18**80,** was dated January 1, 18**84,** and that this last paper went into the hands of the caveatees, dated January 1, 18**84,** a *whole sheet,* and came out not only changed in date so as to be January 1, 18**80,** and six days earlier than the first altered paper, but with the *last one-eighth of the sheet torn off,* and that this last one-eighth was not blank, but contained testamentary writing.

8. There is no pretense of an innocent spoliation or mutilation; on the contrary, the alteration of dates and the suppression of the last one-eighth of the last testamentary paper are absolutely denied.

It is confidently contended that the facts proved by the caveator, if they had been submitted to, and believed by,

the jury, would show that the papers have been altered—have been fraudulently altered—and have been altered with the intent to prevent a revocation of this paper dated originally January 1, 1880, in favor of the caveatee, E. A. McIntire, and his family, by the paper dated by David McIntire four years later, January 1, 1884, which, as far as we can know, would have left an intestatcy, except as to the articles mentioned.

The revocation of the former paper could have been made twenty times on the missing one-eighth of a sheet of a legal cap. The words, "this my only will," "the law makes a will for me," "let the law give the rest," "January 1, 1880, revoked," "have changed my mind since January 1, 1880," or any kindred form of expression, would have accomplished a revocation, and would equally well escape the observation and remembrance of those, not appreciating its legal significance, who examined it on the one occasion.

Assignment of Errors.

I.

The court erred in admitting the alleged last will in evidence upon the proof stated in the first bill of exceptions. (Rec. 87.)

II.

The court erred in excluding from evidence in the case the record and proceedings in the special term for Orphans' Court business, relating to the estate and to the alleged will, as stated in the second bill of exceptions. (Rec. 115.)

III.

The court erred in excluding from evidence in the cause the record and proceedings in the equity cause be-

tween Charles McIntire, Jr., and others against Edwin A. McIntire mentioned in the third bill of exceptions. (Rec. 115, 116.)

IV.

The court erred in excluding from evidence the inventory filed by Edwin A. McIntire of the personal estate of David McIntire as stated in the fourth bill of exceptions. (Rec. 116.)

V.

The court erred in excluding from evidence the inventory of the personal estate of David McIntire when offered for the purpose stated in the seventh bill of exceptions. (Rec. 128, 129.)

VI.

The court erred in excluding the evidence tending to show that the caveatee, Edwin A. McIntire, had falsely represented to the counsel of the caveator, on or about the 7th of January, 1885, that he, the caveatee, had only then recently learned of the character and value of the estate left by the alleged testator, and the admission of the said caveatee that he had previously informed the counsel for said caveator that the estate was of trifling value as set out in the ninth bill of exceptions. (Rec. 130.)

VII.

The court erred in refusing the instruction asked by the caveator set out in the tenth bill of exceptions. (Rec. 132.

VIII.

The court erred in refusing the instruction asked by the caveator as set out in the eleventh bill of exceptions. (Rec. 132.)

IX.

The court erred in refusing the instruction asked by the caveator as set out in the twelfth bill of exceptions. (Rec. 133.)

X.

The court erred in refusing the instruction asked by caveator as set out in the thirteenth bill of exceptions. (Rec. 133.)

XI.

The court erred in refusing the instruction asked by caveator as set out in the fourteenth bill of exceptions. (Rec. 134.)

XII.

The court erred in refusing the instruction asked by caveator as set out in the fifteenth bill of exceptions. (Rec. 134.)

XIII.

The court erred in refusing the instruction asked by caveator as set out in the sixteenth bill of exceptions. (Rec. 135.)

XIV.

The court erred in refusing the instruction asked by caveator as set out in the seventeenth bill of exceptions. (Rec. 136.)

XV.

The court erred in refusing the instruction asked by caveator as set out in the eighteenth bill of exceptions. (Rec. 137.)

XVI.

The court erred in refusing the instruction asked by caveator as set out in the nineteenth bill of exceptions. (Rec. 138.)

XVII.

The court erred in directing the jury to return a verdict for the caveatees upon all the issues as set out in the twentieth bill of exceptions. (Rec. 139.)

ARGUMENT.

Though there are many errors assigned, they will be found, upon examination, to present but three questions for decision.

1. Whether the evidence that E. A. McIntire had concealed from the court the existence of the assets, with the connivance of his sisters, and had actually stolen and converted to their joint use fifteen thousand dollars of the cash belonging to the estate, should have been admitted.

2. Whether upon the whole evidence the caveator was entitled to have submitted to the jury the question of the factum of the will—whether or not it was executed by the said David McIntire.

3. Whether, if the paper now dated January 7, 1880, was actually executed by the said David McIntire, it was not revoked by the paper originally dated January 1, 1884, but now changed to January 1, 1880, was a question to be submitted to the jury.

I.

The evidence offered consisted of the declarations of E. A. McIntire to the caveator's counsel to the effect that the testator had left but a trifling estate, (Rec. 130;) the inventory falsely sworn to by him, showing cash only to the amount of $5,845, of which $2,569 was collected after the testator's death, leaving as a balance on hand at the time of the death $3,276 (Rec. 344–345) instead of $18,386,

as shown by his itemized receipt in his own handwriting of April 18, 1884, (Rec. 108,) nearly a year before the false oath of January 26, 1885, (Rec. 345;) the record and proceedings in equity cause No. 9330, (Rec. 324 *et seq.*) by which it appears that a bill was filed, charging E. A. McIntire with this theft and false swearing and his action in said proceedings; and the record and proceedings in the Orphans' Court, showing the admission by him and his sisters of the wrongful taking and conversion of this money. (Rec. 5, 6, 7.)

This evidence was all competent because it went to the credit of the witness; it was part of the *res gestæ*, and tended to illustrate and prove a material fact in the case, namely, the motive and intent of the parties as bearing upon the motives and purposes with which the alleged alterations in the testamentary papers were made. The issues specifically required the answer of the jury as to the *motive* and *intent*. The *motive* and *intent* were just as much facts in issue as the *alterations* themselves. Evidence so tending was competent. As said by this court, in a well reasoned case:

"On the trial, declarations of the defendants were received, which related *not merely to the transaction which is subject of inquiry in this action*, but to *similar contemporaneous* transactions with other parties. The evidence was not incompetent or irrelevant, as contended by counsel. Where fraud in the purchase or sale of property is in issue, evidence of *other frauds of like character* committed by the same parties, at or near the same time, is admissible. Its admissibility is placed on the ground that where *transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive.*" (Lincoln *v.* Claflin, 7 Wall. 138.)

"Decided cases have established the doctrine that *cases of fraud* like the present are among the well-recognized *exceptions* to the general rule, that *other wrongful acts* of the defendant *are not admissible in evidence* on the trial of the particular charge immediately involved in the issue. *Similar fraudulent acts are admissible*

in cases of this description, if committed *at or about the same time*, and when the *same motive may reasonably be supposed to exist*, with a view to establish the *intent* of the defendant in *respect to the matters charged against him* in the declaration." "Some of the decided cases go farther, and hold that such evidence *is admissible, as affording a ground of presumption* to *prove the main charge;* but whether so, or not, it is clearly *competent* as *tending* to show the *intent* of the actor in respect to the matters immediately involved in the issue on trial."

* * * * * *

"Much of the evidence was of a circumstantial character, and it is not going too far to say that some of the circumstances adduced, if taken separately, might well have been excluded. Actions of this description, however, where fraud is of the essence of the charge, *necessarily give rise to a wide range of investigation*, for the reason that the *intent* of the defendant is, more or less, *involved* in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as a means of ascertaining the truth."

* * * * * *

"Whenever the necessity arises for a resort to circumstantial evidence, *either from the nature of the inquiry, or the failure of direct proof, objections* to testimony *on the ground of irrelevancy are not favored*, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances, altogether inconclusive, if separately considered may, by their number and joint operation, especially when *corroborated by moral coincidences*, be sufficient to constitute conclusive proof." (Castle et al. *v.* Bullard, 23 How. 186–87.)

For like reasons, the acts and declarations of the other caveatees were also admissible:

"The declaration alleges that the fraud was a matter of prearrangement between them; and their counsel insisted that proof of such prearrangement was essential to a recovery against Lincoln; but the court held that it was sufficient to show that he subsequently, with the knowledge of the fraud, became a party

to it; that *subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In this holding we perceive no error.*" * * * (Lincoln *v.* Claflin, 7 Wall. 138.)

In a case in the Supreme Court of Pennsylvania, strikingly like the one at bar, similar testimony to that here offered was offered, but rejected in the court below. In reversing that action the court said:

"In conclusion I have to remark that I have examined the several bills of exception, and it seems to me that in every case the evidence offered ought to have been received. The evidence rejected by the court has a bearing *more or less direct* on the factum of the revoking will, as well as the *imputed fraud in its destruction.*" (Jones *v.* Murphy, 8 W. & S. 392.)

The admissibility of like testimony in a case of fraud, such as is here under investigation, is also well illustrated in a recent decision of the Court of Appeals of this District, (Pryor *v.* McIntire, Washington Law Reporter, XXIV, No. 4, p. 49,) and is ~~stringly~~ strikingly appropriate as it concerns the alleged fraudulent conduct of the same persons (E. A., Martha and Emma T. McIntire) where they were found to have confederated together to cheat and defraud by means of forged deeds and impersonation of fictitious persons.

In that case evidence was offered tending to show that one of the parties, Martha McIntire, had drawn money in Philadelphia upon a forged power of attorney purporting to be executed by a person then dead, and though this transaction had no connection with the case then before the court, the Court of Appeals held it relevant and admissible. The court says in the opinion:

"(1.) There is no such personage as the Emma Taylor who figures in the transactions of this and the other cases as grantee and grantor in certain deeds and instruments of writing. She is an invention of Edwin A. McIntire.

"(2.) Who actually signed the name Emma Taylor, and personated her in acknowledging the execution of the many deeds purporting to have been made by her, need not be certainly ascertained. The evidence, however, tends strongly to show that Emma T. McIntire, sister of the defendants, signed the name to all of the said deeds. Two experts in handwriting, of reputed skill, express that opinion. Comparison of the Emma Taylor signature with certain signatures of Emma T. McIntire, acknowledged to be genuine, does not tend to lessen the weight of the expert testimony. Certain facts and circumstances tend to strengthen the conclusion.

"Annie L. Galliher, who is the daughter of a brother of Emma T. McIntire, testified that her father's name was Edwin Taylor McIntire, and that the T in her name stood for Taylor; and that she was ordinarily called Emma Taylor in the family to distinguish her from witness' sister Emma V. McIntire. Edwin, Martha and Emma T. McIntire denied this, and said that Emma had herself assumed the T to distinguish her from other Emma McIntires, and it had suggested itself because her father had often called her 'Tinsey ush,' and she had, when small, called herself 'Tots.' Our conclusions with regard to the evidence of these persons, upon certain other points, are such that we cannot accept their statements as sufficient to overcome the evidence of a single unimpeached witness, who, besides, has no pecuniary interest in the case, whatever may be the ill-feeling between her and them. *Moreover, a certain unquestioned and unexplainable fact which was under the circumstances relevant testimony, shows that the said brother and sisters were capable of such personation and fraudulent imposition upon an officer authorized to authenticate instruments. They had another sister, Sarah I. McIntire, who died in Philadelphia, January 10, 1881, leaving a deposit of $1,196.60 in the Philadelphia Saving Fund Society. Martha McIntire drew this money upon the presentation of a power of attorney purporting to have been executed on May 2, 1881, by the said Sarah I. McIntire, and acknowledged on the same day before a notary public in the city of Washington. The blank spaces of this instrument were filled out by E. A. McIntire, and he subscribed the same as a witness.*

"(3.) Martha McIntire is not an innocent purchaser of the property in controversy in this or in any one of the cases. She and her sister, Emma T. McIntire, have, under the influence of their brother Edwin, co-operated with him in his schemes to defraud this and other complainants."

Here, as in the above case, E. A. McIntire was engaged in a fraudulent scheme, and he got his sisters to co-operate with him in the scheme. The present case is much stronger than the case of Pryor *v.* McIntire, above quoted from, because the fraudulent acts offered to be shown in evidence had to do with the very matter under consideration here—namely, whether the alleged testamentary papers were not part and parcel of a scheme to steal the estate of David McIntire and to defraud the rightful owners.

II.

The caveator was entitled to have submitted to the jury the question whether the papers purporting to be the will were in fact executed by David McIntire.

This was obviously *a question of fact* purely, and as to which the burden was on the caveatees.

As appears by the face of the papers purporting to be the will (Rec. 339–340) there are no subscribing witnesses or other form of attestation.

No direct evidence was offered to prove the execution of the papers by the testator, but the proponents sought to show the execution of the papers by proof of handwriting. This proof consists of the opinion of one of the beneficiaries under the paper, Emma T. McIntire. (Rec. 142–148.) It will be observed on reading the testimony of this witness, particularly by her cross-examination, commencing on page 143, that she claims to be able to identify the papers as in the handwriting of David McIntire, *including the changed date and even the pen stroke erasing the word "of"* (Rec. 143–144), *yet the same witness is utterly unable to identify or to say whether or not several other*

pieces of writing shown to her are in the handwriting of David McIntire. (Rec. 144, 145, 146.)

Upon this testimony the caveatees rested their case.

The only other evidence offered in support of the genuineness of the paper was the fact that papers were taken from the chest or trunk in which the testator kept his personal effects.

The evidence of the caveator, by the testimony of three of the four witnesses, to the finding of the testamentary papers, showed that the papers presented at the trial were not the same papers found in the chest; that those papers bore different dates from the ones offered in evidence as the will, those found in the chest being dated, the one January 1, 1880, and the other January 1, 1884, the first reading "I, David McIntire, of the city of ———," being a half sheet of legal cap; the other dated January 1, 1884, being a *whole* sheet, while the papers offered in evidence were a half sheet bearing date January 7, 1880, and reading "of this city," instead of "of the city of ———," and *seven-eighths* of a sheet bearing date January 1, 1880, instead of a *whole sheet* dated January 1, 1884. (Rec. 152 to 158, 173–175, 194–196.) The only other witness to the discovery of these papers, Edwin A. McIntire, denied that any change had been made in them.

The testimony of the caveator, Charles McIntire, also tended to show (Rec. 204–205) that the caveatees, or some of them, had drawn a will for the testator, imitating his handwriting and his signature.

If the question of the execution of the paper had depended upon the testimony of Emma T. McIntire alone, it would not have been considered established thereby, but it would have been proper to submit that question to the jury.

In the first place she was an interested party and a beneficiary under the paper. She did not testify to the *fact* that David McIntire executed the paper, but merely

that in *her opinion* it was in his handwriting. When it appeared by her cross-examination that she was unable to identify any other writing as his, or to say whether or not it was his handwriting, the value of that opinion as evidence was the exclusive province of the jury, and though it had been uncontradicted and unimpeached by any testimony could only be resolved by a jury, and comes distinctly within the rulings of this court in the case of Quock Ting *v.* United States, 140 U. S. 149.

When is added to that the testimony of the caveator that the alleged testator said that his handwriting had been imitated by the caveatees, or some of them, in a testamentary paper, and the further fact that the papers, whether genuine or not, had been found in the trunk of the testator, and when produced at the trial were either not the same papers or were altered, it became obviously a case to be determined by a jury.

It has been repeatedly held by this court that in trials at common law, under the provisions of the Constitution, issues of fact can only be tried by a jury unless waived by the parties; that whether there is any evidence legally competent to prove a fact is a question of law for the court, but the weight and sufficiency of such evidence and the credibility of the witnesses are questions exclusively for the jury.

"It is the province of the jury to weigh and decide on the sufficiency of the evidence." "Where there is *no* evidence tending to prove a particular fact the court are bound so to instruct the jury, when requested; but they *cannot* legally give any instruction which shall take from the jury the *right of weighing the evidence and determining what effect it shall have.*"

Greenleaf *v.* Birth, 9 Pet. 298.

"The facts should be left with the jury, *whose peculiar province it is to weigh the evidence, and say what effect it shall*

have. * * * Where there is evidence on the point, the court may be called on to instruct the jury *as to the law,* but it is *for them to determine on the effect of the evidence.*"

Canal Co. *v.* Knapp, 9 Pet. 567, 568.

"The court errs, if it substitutes itself for the jury, and, passing upon the *effect* of the evidence, finds the facts involved in the issue."

Bayliss *v.* Travellers' Ins. Co., 113 U. S. 320, 321.

"Where a cause fairly depends upon the *effect* or *weight* of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them *unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict rendered in opposition to it.*"

Phœnix Ins. Co. *v.* Doster, 106 U. S. 32.

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. *Not whether on all the evidence the preponderating weight is in his favor*; THAT IS THE BUSINESS OF THE JURY; but conceding to all the evidence offered *the greatest probative force,* which, according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict?"

Pleasants *v.* Fant, 22 Wall. 122.
See also Ewing *v.* Burnett, 11 Pet. 50.
United States *v.* Laub, 12 Pet. 5.
Bank *v.* Guttschlick, 14 Pet. 30, 31.
Head *v.* Hargrave, 105 U. S. 45.

It was, therefore, for the jury to say whether these papers were executed by David McIntire; it was for them to say whether they would hold the testimony of Emma T. McIntire to be sufficient; it was for them to say whether these were the same papers which were found in the chest of the testator or fabrications in imitation thereof. It was for the jury to say upon all this evidence whether these papers had been mutilated, and if so in what respects.

III.

The caveator was entitled to have submitted to the jury the question whether the paper now bearing date January 7, 1880, had been revoked by the testator, if in fact it was made by him.

As before shown, two separate testamentary papers were found in the testator's chest together with his valuable personal estate. One of these papers was dated January 1, 1880, and it is the paper under which the caveatees claim the bulk of the alleged testator's large estate. The other was dated January 1 1884, and was a full sheet. In addition to this it contained other testamentary writing not now upon it, but which has been torn off and suppressed as shown by the evidence of three witnesses for the caveator. (Rec. 152, 153, 158, 173, 174, 175, 194, 195.)

As presented for probate, the paper which was four years later in time has been so altered in date as to become six days earlier in time than the paper under which the caveatees claim, and the last portion of this last paper has been torn off and destroyed.

E. A. McIntire, into whose possession these papers went on the morning of their discovery, denies having done this or having made any of the other alterations. (Rec. 284, 285, 286.)

But the testimony on behalf of the caveator tends to show that he admitted having made some of the altera-

tions (Rec. 155), and his own testimony shows that he and the other caveatees all had the papers in their possession immediately after their discovery, and before they were filed in court. (Rec. 284, 285.)

But this same witness, E. A. McIntire, testifies that he is utterly unable to remember the amount of cash bonds, &c. found with the papers, although they were counted over by the three parties and he gave an itemized receipt therefor. (Rec. 296–299.)

Coupled with this testimony is the evidence hereinbefore referred to, showing the purpose and design of the caveatees and their confederating together to secret the estate and to conceal the actual theft of fifteen thousand dollars in money.

The caveator having offered evidence strongly tending to prove that these changes were actually made by Edwin A. McIntire, with the connivance of the other caveatees, it becomes apparent that the object in making them was to transpose the papers in the order of time, making the one which was four years later six days earlier in date than the other paper, and having also offered evidence that the latest portion of the latest paper was utterly destroyed by them, some motive must be assigned for this peculiar sort of mutilation, alteration and suppression. It is inconceivable that any purpose or motive for making these alterations and mutilations could exist, other than that if these papers had remained in their integrity, as found, the latest paper indisputably would have contained testamentary dispositions which would have destroyed or lessened the benefits conferred upon the caveatees by the first paper.

From what appears, as has been stated, it is claimed that this case, indubitably, must be reversed, because execution and the identity of these papers was directly in issue, and it was the province of the jury to determine that issue.

There was evidence tending to prove that these were not the papers found in the box; the sufficiency of that evidence could only be determined by the jury. But, as appears by the record, Mr. Chief Justice Bingham was in doubt as to whether the jury could be authorized to draw any inference that the paper dated January 1, 1884, contained a clause of revocation from the facts which he permitted to be proved in the case, if no other satisfactory explanation of these facts could be arrived at by the jury. He therefore withdrew the *entire case* from the jury.

Can a jury from an act of spoliation of this peculiar character and the other acts of fraud and deception be permitted to draw an inference that there was a revocation, if such acts satisfied them of that fact; or, stated in another form, can a revocation be proved by *circumstantial evidence*, the spoliator refusing to produce the spoliated part of the paper in question?

By his action in taking the case away from the jury, Chief Justice Bingham virtually held that from circumstantial evidence no inference could be drawn that the destroyed part of the second paper revoked the first; or, in other words, he practically held that there was no mode of showing that the second paper revoked the first, except by direct proof of the contents of the second paper.

He did this, however, as appears by the record, not by reason of a conviction in his own mind that such was the law, but with a view to getting the opinion of the general term upon that question. (Rec. 321.) We are brought, therefore, to the consideration of this question, and if it is a sound legal principle that a revocation may be proven by facts and circumstances, and without direct proof of the actual contents of the part of the paper that was torn off and which does not now appear, then it follows that this case must be reversed for that additional reason.

Allusion has already been made, in justice to the trial

judge, to the fact that his decision in this case was practically a reference of the novel and interesting questions of law to the general term in the first instance. But it is the duty of the counsel for the caveator, while they are prepared to argue the questions which involved so much doubt and difficulty for the trial judge, to show that, on the case presented, it was beyond the power of the judge to take away from the jury the issues framed in accordance with the statute, under the supervision of one judge, to be answered by a jury under the supervision of another.

By the testamentary law of Maryland, in force in the District, the power to decide this controversy, both as to law *and fact*, is vested, and was at the time of granting these issues, in the justice holding the Orphans' Court, but by that same law the right is guaranteed to every party in interest, at any time before the actual rendition of the judgment thereon, though a trial may have been entered upon before said justice, to have the issues of fact tried by a jury.

"In the case of Cain et al. *v.* Warfield, (3 Md. Rep. 462,) this court said 'the obvious purpose of the 16th section (sub chapter 15) is to enable the court to advise itself of the real *facts* in the case,' and this is also clearly the object of the 17th section, which provides for an issue or issues.

"Under the act of 1798, '*at any stage* of the proceedings, *before final adjudication*, either party may require it (an issue), and the court is not at liberty to refuse it.' Barroll and Cannell *v.* Reading, (5 Har. and John. 176.")

Pegg *v.* Warford, 4 Md. 393, 394.

Peters *v.* Peters, 20 Md. 178.

It is submitted that in his ruling, the trial justice virtually assumed to decide these issues of fact in contraven-

tion of the statutory right of the party to have them determined by a jury.

The second and fourth issues are not material to be considered.

There was evidence, competent and legally sufficient, offered by the caveator in support of each and every of the six remaining issues. A brief reference to the issues in connection with the testimony demonstrates this fact:

I.

It was for the jury to determine whether the paper writings propounded for the caveatees were, in fact, executed by David McIntire.

The first issue is whether the paper now dated January 7, 1880, was executed by David McIntire. In support of this the caveatees offered testimony as to the handwriting, and also testimony tending to show the custody of the papers by the decedent. The caveator offered testimony impeaching and contradicting this testimony, and showing that no such papers were in the custody of the decedent. The issue of fact was thus distinctly presented for determination.

II.

It was for the jury to determine whether the contents of the paper writings, now propounded, were known to said David McIntire, and this involved the *genuineness and identity of the papers, and the consistency of their provisions with the proved relations of the testator to the parties concerned.*

The third issue is, whether the contents of said paper dated January 7, 1880, were known to the testator at the execution thereof. The only evidence offered in support of this by the caveatees was testimony tending to show that they were in his handwriting, and came from his custody. The testimony of the caveator tended to show

that they were not in his handwriting; that they did not come from his custody, and, in addition thereto, testimony tending to show the improbability that the paper dated January 7, 1880, was written by the decedent, by testimony tending to show that the personal relations of the decedent towards the parties, beneficiaries under said paper, were inconsistent with the attitude indicated by the dispositions made in the paper.

III.

It was for the jury to determine whether the papers now propounded were the complete and final last will and testament of David McIntire, which involved the determination not only of the *genuineness and identity, but of the integrity and finality of the testamentary papers.*

The fifth issue is whether the said paper now dated January 7, 1880, is the complete and final last will and testament of said decedent. The caveator offered testimony tending to show that four years after the making of said paper, by whomsoever the same was made, and on January 1, 1884, the said David McIntire made a will, and that said will in its entirety and integrity went into the possession of the caveatees on the morning of the death of the testator, and by them had been mutilated, altered and in part suppressed and destroyed.

IV.

It was for the jury to determine whether the *destruction of the genuineness, identity and integrity of the testamentary papers left by David McIntire at his death was fraudulent and in violation of the rights of the caveator.*

The sixth issue is whether the paper writing purporting to be the last will and testament of David McIntire, or any part thereof, had been fraudulently altered since

his death and before the probate thereof, by any person to the prejudice of any of the next of kin. Upon this issue the caveator offered the testimony of three witnesses, tending to show that the said papers had been altered since the death of David McIntire. The papers offered in evidence bear the physical indications of alterations and mutilations, and the caveator also offered evidence, tending to show that such alterations were carefully, designedly, secretly and fraudulently made in connection with other fraudulent acts forming part and parcel of a common scheme to cheat and defraud the next of kin.

V.

It was for the jury to determine, *as a matter of fact*, in order to enable the proper court to declare the legal consequences of said alterations, *what the alterations were, how they were made and by whom they were made.*

The seventh issue is, whether the said instrument purporting to be the last will and testament of David McIntire had been in any respect altered since his death; and if so, what the said alterations were, how they were made, and whether they were made by or with the privity of any party interested in the same. In support of this issue the caveator offered testimony tending to show that the said instrument had been altered; that the alterations consisted in changing the dates of said papers by changing the words of one of said papers so as to import therein a declaration of domicil, and by the utter suppression of the last portion of the latest paper, which last portion contained other testamentary writing not now contained in the said papers; and also tending to show that the said alterations were done by the caveatee, Edwin A. McIntire, with the assistance and consent of the other caveatees, and also tending to show that the part so suppressed contained a revocation of the provisions of the paper now dated January 7, 1880.

VI.

It was for the jury to determine, *as a matter of fact*, whether the first paper, now bearing date January 7, 1880, and originally dated January 1, 1880, *had been revoked*. This was not a question of law, the construction of one writing as it affected another, but a question of fact which the jury was lawfully authorized to determine, instead of the judge of the Orphans' Court, who framed the issues or of the judge of the Circuit Court, before whom they were tried.

The eighth issue is, whether the said instrument purporting to be the last will of David McIntire, or any part thereof, has been revoked. In support of this issue, the caveator offered testimony tending to show that the said David McIntire, between the years 1880 and 1884, entertained hostile and unfriendly feelings towards the caveatees; that on the first of January, 1884, he made a testamentary disposition of his estate; that said testamentary disposition was made four years later than the part of said paper now dated January 7, 1880; that the said last paper had been mutilated, altered and in part suppressed and destroyed by the caveatees claiming under the earlier paper now dated January 7, 1880; that the alterations, mutilation and suppression, so made and done by them, were inconsistent with any other purpose than the suppression of a revocation of the provisions in the first paper, and also tending to show that this act of suppression and mutilation and alteration was attended with other acts of a fraudulent, misleading and deceptive character, directed to secure to the caveatees the benefits contained in the provisions of the paper now dated January 7, 1880. The caveatees offered no testimony tending to explain the alterations, mutilations and suppression of said papers, or of any of the accompanying and fraudulent acts by them and each of them committed, the only evidence offered by the caveatees being evidence intended to show

that said alterations, mutilations and suppressions had not, in fact, been made by them or any one.

The court erred in withdrawing from the jury the decision of the sixth, seventh and eighth issues, because the caveator had offered such direct and positive evidence, as, with the inferences properly deducible therefrom, would have justified a verdict in his favor.

The court is not justified in withdrawing the case from the jury unless, as said by this court, "the evidence, with *all the inferences the jury could justifiably draw from it*, was insufficient to support a verdict."

Randall *v.* R. R. Co., 109 U. S. 482.

From the direct evidence the jury could, by the application of common experience, properly have inferred that the papers had been fraudulently altered, that the alterations were done by the caveatees, and that the paper now dated January 7, 1880, had been revoked by David McIntire. Not only could such inferences be logically and "justifiably" drawn from the evidence, but they flow from it as a matter of law.

"If, therefore, on another trial," say the Supreme Court of Pennsylvania, reversing the court below, "the jury should find the factum of a *subsequent will*, and that this will was *destroyed or withheld by fraud*, they *may*, and, as I conceive, are *bound to infer* that the *second will contained inconsistent dispositions with the first. Nay, more, in odium spoliatoris*, that the *second will* contained a clause *expressly revoking the former will;* in point of law it *must be regarded as a will subsisting at the death of the testator so as to operate as a revocation* of all former devises. It is far better that there should be an intestacy than that a spoliator should be rewarded for his dishonesty. It is *absurd* to require strict proof of the contents of a will *so as to operate as a revocation where it appears that it has been destroyed by fraud.*"

Jones *v.* Murphy, 8 W. & S. 301, 302.

"There can be no possible doubt as to the validity of a will or codicil, duly executed, although it be destroyed in the lifetime of the testator, if *so destroyed by fraud or mistake and without his consent.*"

* * * * * * *

"Even where the exact contents of a will cannot be ascertained, if it has been *suppressed or destroyed by a person interested in opposition thereto*, the court or *jury* in *odium spoliatoris will be authorized to presume many things* as against a party who has been guilty of the fraudulent act."

Chancellor Walworth in Betts *v.* Jackson, 6 Wend. 181.

"It is well established that where a deed, a will, or other paper is proved to be destroyed or suppressed, or there is *vehement suspicion of its having been done*, the presumption, *in odium spoliatoris*, applies in favor of the party who claims under such paper, *though the contents are not proved.*"

* * * * * * *

"The circumstances of this case would justify the *utmost latitude of presumption* in the *court, jury, master or auditors.* The fraud was *premeditated;* the spoliation *wilfully* made to conceal it."

"It would *confound all distinction* between the *spoiler* and the *despoiled*, and tend to *encourage* rather than to *suppress spoliation* by throwing on the innocent party the burden of supplying the evidence which the other had destroyed."

Askew *v.* Odenheimer, Baldwin's C. C. 380, 391, 392.

Lord Mansfield, commenting upon a special verdict where the jury found a second will different from the first, but did not find wherein it differed, says:

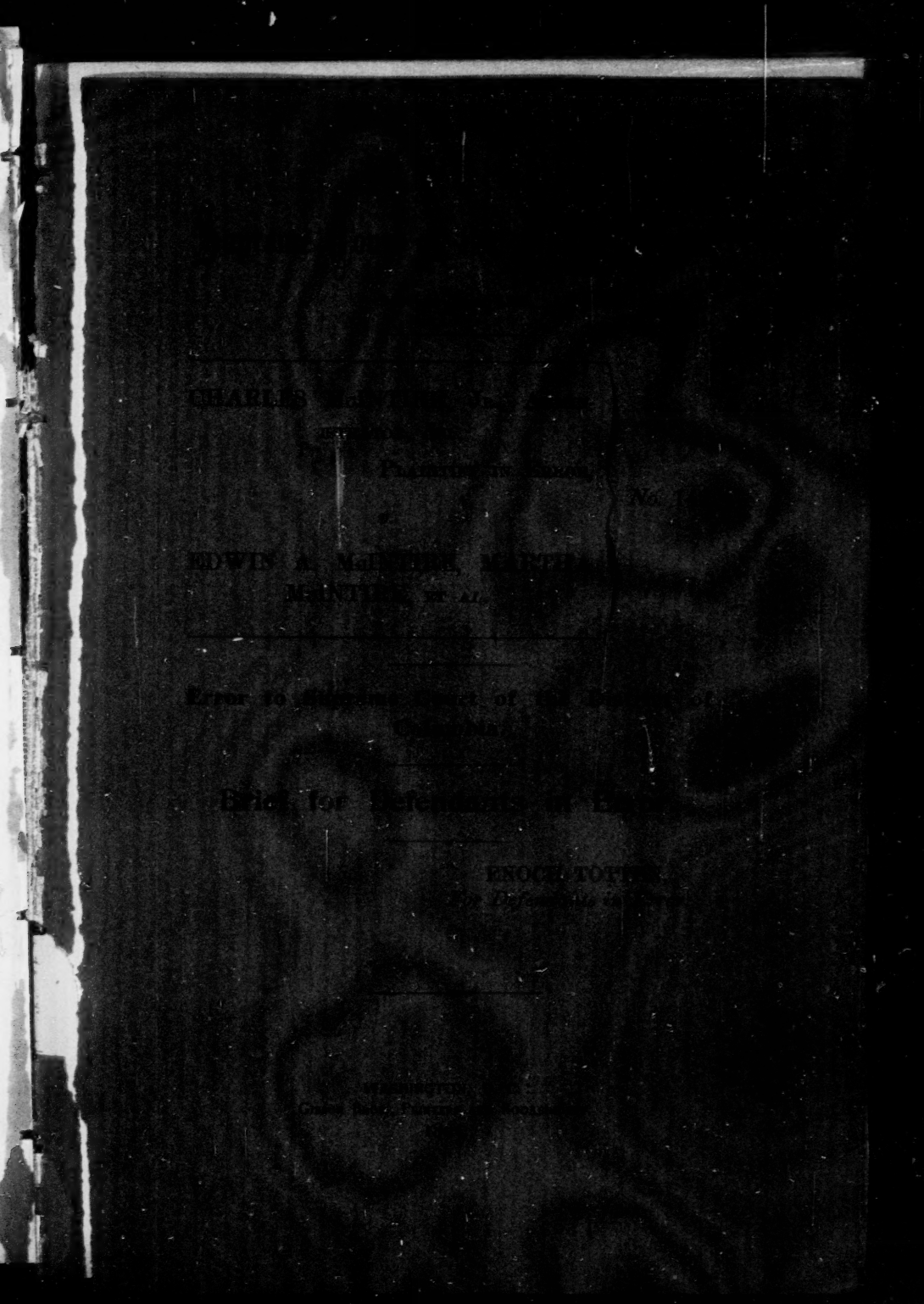
"The jury might have had evidence to prove an incon-

sistent disposition or circumstances to lay a fair foundation for *presuming* it to be so, as *spoliation* or the like."

Harwood *v.* Goodright, Cowp. 91.

It is respectfully submitted that the judgment should be reversed and a new trial should be granted, with instructions to receive the evidence offered and rejected at this trial, and to direct the jury as asked by the caveator.

JEREMIAH M. WILSON,
CALDERON CARLISLE,
WM. G. JOHNSON,
Counsel for the Caveator.



FILED
MAR 9 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

CHARLES McINTIRE, JR., ADMINISTRATOR, &C.,
PLAINTIFF IN ERROR,
v.
EDWIN A. McINTIRE, MARTHA McINTIRE, ET AL.

No. 142.

Error to Supreme Court of the District of Columbia.

Brief for Defendants in Error.

ENOCH TOTTEN,
For Defendants in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

CHARLES McINTIRE, JR., ADMR., &C., PLAINTIFF IN ERROR, v. EDWIN A. McINTIRE, MARTHA McINTIRE ET AL.	No. 142.

Error to Supreme Court of the District of Columbia.

Brief for Defendants in Error.

STATEMENT OF THE CASE.

This is a controversy over the last will of David McIntire, deceased, late of the District of Columbia. The testator was unmarried, and died in this city on the 1st day of April, 1884, at the age of seventy-two. He was possessed of a handsome fortune, consisting entirely of personal property, all of which was situated in this city. He left a will distributing his entire estate among some of his relatives to the exclusion of a brother residing in Easton, Pa. The will was somewhat informal, he having written it with his own hand, but it was effectual to pass personal property under

the testamentary system of Maryland, still in force in this District. The will appears to have been drawn on two papers, one of which seems to have been in the nature of a codicil, but this latter document disposed of very trifling items of his estate. The testator did not name an executor of his will. These two testamentary papers were regularly probated in the branch of the court below having jurisdiction in that behalf, on the 12th day of April, 1884, and letters of administration c. t. a. were issued to Edwin A. McIntire, a nephew and beneficiary, who duly qualified and proceeded to administer upon the estate. After his administration had proceeded for a long time, the brother of the testator before mentioned, Charles McIntire, of Easton, Pa., instituted proceedings in the probate branch of the court to set aside the will, and thereupon issues were regularly framed and were sent in the usual way to another branch of the court, to be tried by a jury. Upon errors alleged to have been committed on the trial of these issues, this case has been brought here.

The said issues, framed by the probate branch of the court, and tried by the jury, were the following, to wit:

1. Was the paper writing, as now probated and now bearing date January 7, 1880, purporting to be the last will and testament of said David McIntire, deceased, executed by said David McIntire in due form as required by law?

2. Was the said David McIntire, at the time of the alleged execution of the said paper writing as now probated and now bearing date January 7, 1880, of sound and disposing mind, and capable of making a valid deed or contract?

3. Were the contents of said paper writing, as now probated and now bearing date January 7, 1880, read to or by the said David McIntire, or otherwise made known to him at or before the execution thereof?

4. Was the said paper writing, as now probated and now bearing date January 7, 1880, executed by said David McIntire under the undue influence or by the fraud of any person or persons?

5. Is the said paper writing, as now probated and now bearing date January 7, 1880, the complete and final last will and testament of the said David McIntire?

6. Has the said paper writing, purporting to be the said last will and testament of the said David McIntire, deceased, probated on the 8th day of April, 1884, or any part thereof, been fraudulently altered, since the death of said David McIntire and before the probate thereof, by any person or persons to the prejudice of any of the next of kin or heirs at law of said David McIntire?

7. Has the said instrument, purporting to be the last will and testament of said David McIntire, deceased, been in any respect altered since the death of said David McIntire; and, if such alterations have been made, what were the said alterations and how were they made; were such alterations made by any party interested under said will, or with the privity of any party interested under said will?

8. Has the said instrument, purporting to be the last will and testament of said David McIntire, deceased, or any part thereof, been revoked?

The principal grounds for assailing the will in this case are as follows:

1. That the will was altered as to material matters by one of the beneficiaries under its provisions, after the death of the testator.

2. That the will was revoked by the testator, and that the portion of the testamentary paper containing such revocation was torn off by the same legatee.

The case was twice tried by jury on these issues; the first

verdict was set aside by the trial court because of some irregularity in the verdict. The report of this first trial will be found in the record, beginning on page 39 and ending on page 81. The use of this report in this record is not perceived. The report of the proceedings during the trial which is here for review begins on page 82 of the Record.

At the close of all the testimony in the case on the last trial, counsel for the caveatees moved the court to peremptorily direct the jury to find in favor of the caveatees on all the issues, which motion was granted by the court. This is the error complained of. The cause was taken to the general term of the court below, where the action of the trial court was affirmed. Then the case was brought here, but somewhat irregularly, and a motion to dismiss was submitted to this court, but was denied.

Points and Authorities.

1st. Was the court wrong in its direction to the jury to find all the issues for the defendants?

The following facts are supposed to have been either conceded or not to have been seriously controverted:

1st. The testator was of sound and disposing mind and capable of making a valid deed or contract. He had the capacity to make and keep a large estate, and there was no evidence tending to show the slightest impairment of his faculties.

2d. The will was in due form of law. It was a will bequeathing only personalty, and the law requires no particular form.

3d. The two papers which were probated together as his last will were wholly written by himself and appear to have been folded together and endorsed on the back by the testator. There was also the following endorsement on the back of the will:

"The judges of the courts lay it down as a rule in law, that what a person leaves in his handwriting with his name attached is his will, and it is the law. The law requires no particular formality in action or words to constitute a valid will or bequest.

"DAVID McINTIRE."

This indicates that the testator had carefully informed himself as to the legal requirements to make a valid will of personalty in this District. So that there could be no doubt that the contents of the will were read by and were known by him before signing the papers.

The 4th issue propounds the question as to whether the will as now probated was executed under the undue influence, or by the fraud, of any person or persons. It will not be seriously claimed that there was any testimony tending to support this issue. The court will search the record in vain for the slightest testimony tending that way. The foolish testimony of Charles McIntire, the caveator, as to a pretended conversation between himself and David, held at Carpenter Hall, in Philadelphia in Dec., 1882, if it were competent, could not be considered as having any tendency to show undue influence; which means that the mind of the testator is so dominated by the person exercising the influence that he has no power of resistance. If the statement were true it would show that the testator did not submit, but repelled and scouted it. A feeble attempt was made to show by the testimony of Mrs. Laura Galliher and her sister, Emma V. McIntire, that David McIntire was not fond of his nieces, who are legatees, but it is scarcely worthy of any notice, and then the malignant animus is plain. The overwhelming testimony was that the testator's relations with his nieces were friendly and cordial, and his relations with his nephew, E. A. McIntire, were most intimate and confidential.

Alterations in the Will.

The 6th, 7th, 8th, and 9th issues depend upon the question as to whether the will was so altered after the death of testator as to destroy it as a testament.

The alterations alleged are that the date of "*January 1st*" on one of the papers was changed to "7th," and that the words "*of the city of*" were changed to "*of this city*," and that on one of the papers the year "1884" had been changed to "1880." It was also asserted that a fold had been torn from one of the papers upon which were some words about testator's "glasses" or "spectacles." These were the alterations charged, and the charge was denied, and the testimony produced by the defendants to contradict the charge that the alterations had been made after the death of the testator, fairly disproved the assertions of the caveator.

The following is the testimony offered by the plaintiff touching that point:

Testimony of Mrs. Galliher:

One paper was dated Jan'y 1, 1880, and the other Jan'y 1, 1884.

The one dated 1884 was a new sheet of legal cap (pp. 88, 153).

The figure "7" in the date, and the word "this," are not in David McIntire's writing. The papers look to be the same, although they have been altered and a part of them gone (pp. 89, 156).

Says her husband took a copy of the papers and copied them word for word (88, 154).

At the probate court called E. A. McIntire's attention to the changes of dates, and he said he thought it better to have them both one date and one year (E. A. McIntire denies this).

She did not at that time notice a part of the will had been torn off.

At the time of signing the affidavit to prove the will she knew the papers had been altered (p. 31, Rec.). Knows of a writing that was on one of the papers which is not there now, it was about his "glasses." She does not remember if there was any other writing on the paper (88, 89, 157, 158).

In the summer of 1884, E. A. McIntire sent her word that she would not receive anything under the will. Then she went to the court-house and saw that the paper was torn off and that there were alterations.

It was indirectly in consequence of the word E. A. McIntire sent her that she concluded to re-examine the will.

She had read the will very carefully, noticed the fold torn off, because she missed the expression about the glasses.

Would have missed with equal readiness the absence of anything else as she did in regard to the glasses. These were such little matters, of such little importance, they did not deserve to be mentioned in a paper of this kind (89, 90, 159, 160, 161, 162).

Says she has known E. A. McIntire all her life, and never knew him to do anything that was not square and upright (p. 37, Rec.).

Says she does not deny that she is hostile to him and his family (p. 43, Rec.).

She is interested in the defeat of the will. Thought it was all right and should stand as the will until she discovered she was not a legatee under it.

Began correspondence with Chas. McIntire, the caveator, in February or March, 1885, and has been in correspondence with him since the contest began (p. 45, Rec.); that was the first time she met him since she was a little girl.

He knew she was disgruntled about the will because she was cut out (89, 90, 161, 163).

Testimony of Mr. Galliher:

On the morning of the death of David McIntire, E. A. McIntire, my wife, my wife's sister, Emma V. McIntire, and myself found two papers which we supposed were his. I read them and examined them (p. 60, Rec.), made a copy of this paper, the one that is spoken of as having a part of the sheet gone; made this copy before turning paper over to E. A. McIntire (89, 92, 172, 173, 174).

Note.—This copy was used by this witness to refresh his memory when on the witness stand, *but was not offered in evidence.*

Says there was a writing on the paper that is not there now; it was something about glasses. "My spectacles or glasses to those who will take them" (92, 174).

Does not know of any other writing on these papers besides the expression about the glasses that is not there now (93, 178).

They were of no intrinsic value.

Identifies the papers and says "the city of" has been changed to "this city," and the word "of" scratched through with a pen; thinks January 7 was January 1 (p. 62, Rec.).

In the second paper the year 1884 has been changed to 1880 (p. 63, Rec.).

Says he noticed these alterations the third time he went to the court-house.

After his wife told him about alterations he went to look for them (92, 93, 94, 180, 182).

After seeing the alterations, did not go to McIntire or demand an explanation, nor did he go to the probate court to state that he had sworn to that will under a misappre-

hension. First spoke of it to a lawyer when he understood from Mr. McIntire that his (Galliher's) wife would not take under the will; that was six or eight months after he made affidavit at probate court (93, 184).

He says he found two papers in the box, and that these were probated (173, 175).

He swore in the probate court that they were in the handwriting of the testator (181).

He was also asked (183) how he happened to discover that the will was mutilated or that that part of the paper was torn off, and he answered:

"Because it was a whole sheet at the time I turned it over to E. A. McIntire, and *this bequest* was on there *in regard to the glasses;* that portion of the sheet had disappeared, and *that bequest was not on there*" (183).

He was also asked this question:

"Q. Did you know of any other writing on those papers besides the expression about the glasses, to which you have referred, *that is not there now?*"

His answer was:

"*I do not, sir*" (178).

Testimony of Emma V. McIntire:

Is a sister to Mrs. Galliher. Saw the two papers taken out of the chest, dated Jan'y 1, 1880, and Jan'y (something), 1884. The papers now shown are the same, except the date, and one reads "of this city," when it originally read, "of the city of" (95, 195).

The wills were read aloud, and then all present took and read them (p. 102). She read the papers carefully. We all supposed we were entitled under the will, and went to

court to prove it (p. 103, Rec.). When she read them at the court she had every reason to believe they were just as they were when found. Subsequently she went *with her sister and her husband* to examine the will, *after they had been advised that they would receive* nothing. When asked if she remembered anything about glasses, she said there was some little remark about glasses. I do remember something about glasses (95, 96, 195–6–7).

The following extracts from the testimony of Mrs. Galliher on the subject of attestations and of the alleged revocation are interesting (p. 158 *et seq.*):

"Q. Do you know of any matter of writing at all that was on either of the papers found in that chest which is not on either of these papers here?

"A. I do not know. I have not read both of those very carefully since I have been here.

"Q. You read them at the former trial?

"A. Yes, sir.

"Q. Suppose, then, before answering the question, you read them."

(After reading same, the stenographer repeated the first question to witness since recess.)

"A. Yes, sir. There was one thing that I remembered particularly, and that was about his glasses.

"Q. What was that?

"A. He said he left his glasses to those who would take them or have them.

"Q. You remember that that was on one of the papers?

"A. That, I know, was on the paper when I took it out of the chest.

"Q. What paper was that on, do you know?

"A. That was on the paper dated 1884.

"Q. It is not on either of these papers?

"A. No, sir.

"Q. *Do you know whether there was any other writing on the paper?*

"A. *That I do not remember.*

"Q. There might have been?

"A. There might have been.

"General HENKLE: Oh, no, Mr. Johnston; hardly that way. She is an excellent witness.

"Mr. JOHNSTON: Excellent; I never knew better.

"General HENKLE: She can testify, and you need not testify for her.

"By Mr. JOHNSTON:

"Q. Will you please explain what led to your discovering these additional changes on this paper of which you have spoken—how you came to notice them?

"WITNESS: Notice the alterations in these papers?

"Q. Yes; after the interview with Mr. McIntire in the probate court.

"WITNESS: *I do not know the form of answer that you want.*

"Q. You testified heretofore that on that occasion of the interview with Mr. McIntire he satisfied you of the propriety of swearing to that affidavit, and that the particular alterations were inconsequential and made no difference, and so forth. I want you to state now to the jury what led you to give any further consideration to the question of the condition of this paper and to observe these further alterations—the tearing of a part of one of these papers. What led you to make that examination?

"A. Mr. McIntire sent me word in the summer of 1884 that my brothers, sister, and myself would not be beneficiaries under the will. I remarked that I did not propose to rely entirely on his judgment in the matter, and asked Mr. Galliher to consult a lawyer about it. This lawyer told him that he had better find out what inventory of the property had been filed. He went to the court-house and looked over the papers and——

"General HENKLE (interrupting): I object to what the lawyer told you.

"By Mr. JOHNSTON:

"Q. Never mind what the lawyer told you. I want to know what led you to make any further examination of

this. Did anything occur to you to cause you to look into Mr. McIntire's conduct?

"A. That was the beginning of it.

"General HENKLE: I do not want you to tell what other people told you, but what you know yourself.

"A. I went to the court-house and looked at the papers myself, and I saw that the paper was torn off; that there was another alteration that I did not notice when the paper was probated."

On cross-examination this witness said further, on this subject (161):

"Q. How did you come to notice that the fold of that second paper was torn off?

"A. I missed the expression about the glasses.

"Q. And that led to the discovery that the paper upon the part of the sheet upon which that was written had been torn off?

"A. Yes, sir.

"Q. This will you had noticed with some particularity, had you not?

"A. I had read it over carefully.

"Q. You must have read it over pretty carefully to have retained in your recollection the specific direction with regard to the glasses and where it was found in the paper.

"A. I do not say that I remember where it was found. I say I missed it and it was not in the paper when I read it the second time.

"Q. You knew it was on the second paper?

"A. I knew it ought to be there when I read it the second time.

"Q. Could you have missed anything else that was there?

"A. There might have been other writing.

"Q. Would you have noticed the omission of anything else that was in that paper? You have not noticed with any more particularity the provision with regard to the glasses than anything else, have you?

"A. No, sir.

"Q. *Then you would have missed with equal readiness the absence of anything else, would you not, as you did in regard to the glasses?*

"A. *I think I would.*

"Q. Then, if there had been anything else omitted from it, would you have at once known that the will had been spoliated, or that it had been taken off in some way?

"A. If it had been impressed on my memory.

"Q. There was nothing to impress about the glasses upon your memory more than anything else?

"A. Yes, sir; there was.

"Q. What was that?

"A. The expression was rather odd—the way it was written—the sentence. At the time we read the will, when we came to this, it caused a smile. He said that he left his glasses to those who would have them. They were not a particle of account, and we were amused at his putting them in the will.

"Q. Are not his expressions, most of them, a little quaint and unusual?

"A. Yes, sir; a little. These were such little matters, of such little importance, that they did not deserve to be mentioned in a paper of this kind.

"Q. How about the handkerchiefs and other trifling things that are mentioned there? Were those of importance?

"A. Not a great deal.

"Q. Would you have missed any of them if you had not found them in the will when you went to re-examine it?

"A. Well, they could have been taken out of the will; but if they had been taken out of the middle, I expect I would have missed it.

"Q. Then you had that paper sufficiently in your mind to miss anything that was taken out of it, had you not?

"A. Anything, as I said, that had been impressed upon my memory.

"Q. Now, would you say to the jury that there was no other writing on that fold that you say was torn off?

"A. That I do not remember.

"Q. Other writings than what you have already testified to?

"A. I do not remember. I recollect about the glasses, and that was the only article that was mentioned that I recollect; but there might have been other writing there that I do not remember.

"Q. You would not swear that there was no other writing, would you?

"A. I cannot say that there was or was not."

Mr. Justice Cox, in his able and concise opinion in this case, delivered in the general term of the court below, in reference to this evidence just mentioned, said (19 D.C. R.; 8 Mackey, 491):

"Now, it is claimed by the caveators that from this apparent mutilation it is fair to infer that there was a clause of revocation in that paper, and it was the object of E. A. McIntire to get rid of it. It appears that both of these papers were opened and read, in the presence of four persons—Mrs. Galliher, her husband and sister, and E. A. Mc Intire. Now, Mrs. Galliher and her sister supposed that they were beneficiaries under the will, and if there had been anything about a revocation in that part of the will said to have been torn off, certainly they would not have overlooked it. The husband of Mrs. Galliher took a memorandum of the items, and both of them were on the stand. They were not asked if the part torn was a clause of revocation, and they did not testify that there was anything of the sort in the paper. The husband did not even produce the memorandum which he took, and which is supposed to be in his possession. As they are absolutely silent on the subject of a revocation, it is equivalent to testimony that no such clause of revocation existed, and really the jury was asked to infer the existence of a clause of revocation, only from the circumstance that there is a mutilation of the paper, almost in the face, I might say, of testimony that there was no such clause. The only thing that was testified to as having been stated in that paper which is not now in it, was the mere disposition of the old man's glasses to whoever might want them.

"If the jury had found against the will on that evidence, it seems to me that it would have been the duty of the court to set it aside. Three witnesses, who take special pains to show how all the contents of these papers were impressed upon their memories, said that there was something in the so-called codicil about the testator's glasses that they did not find after it had been filed in the probate court, but they do not intimate that there was a single word in it about the revocation of the will. The fact that they do not, it seems to us, is equivalent almost to saying that there was no such revocation, and yet the court were asked to authorize the jury to infer such a revocation in the face of this proof by the caveator." (See opinion in Appendix to this brief.)

The Law as to Alterations.

Alterations to affect a deed, bond, or contract must be material alterations.

22 Wend. at 292, 293.

In Reed *et al. v.* Kemp, 16 Ill. 445, Kemp filed a bill for specific performance of a bond to convey land. The defendant set up that the bond had been altered by Kemp by inserting the words "I, J. G. Reed" in the beginning of the instrument, changing the word "three" to "five" in expressing the consideration of the bond, and the erasing of the figures "12" after the word "July" and putting them before. Says the court, p. 449:

"The alterations admitted by Kemp to have been made by him are immaterial, nor, indeed, can we regard any alleged alterations to be material; to alter the sense, liability, or obligation of the bond."

In Steele's Lessee *v.* Spencer, 1 Penna St. 552, it was claimed that a deed had been altered by inserting the name of William Steele as grantee after its execution and attestation instead of the name of some other grantee which had

been stricken out, and by inserting the words "Ross" and "Ohio" as descriptive of the grantee's residence. The court say, p. 360, that these alterations may or may not have been material, "as upon a sound construction of the whole instrument they would or would not alter or change its operation and effect." See also 1 Greenleaf Ev., p. 566:

"A distinction, however, is to be observed between the alteration and spoilation of an instrument. An alteration is an act done upon the instrument by which its *meaning* or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result or to mislead any person, it is not an *alteration*. The term is at this day usually applied to the act of the party entitled under the deed or instrument, and imparts some fraud or improper design on his part to change its effect. But the act of a stranger without the participation of the party interested is a mere spoliation or mutilation of the instrument, not changing its legal operation so long as the original writing remains legible, and, if it be a deed, any trace remains of the seal." (See foot-note, and U. S. *v.* Spalding, 2 Mass. 478.)

Effect of Alterations in Wills.

Alterations in a will made by a stranger do not affect the validity of the testament in other respects. (Schouler on Wills, par. 434.)

In Grubbs *v.* McDonald, 91 Pa. Stat. 241, the court said:

"Finally we notice the objection to the will as evidence; it was said to be altered in a material manner after its execution by Grubbs, and in this manner its effect as a testamentary paper destroyed. This is an extraordinary proposition, for a will, unlike a deed, has but a single party, and the only thing to ascertain is what that party desired concerning the disposition of his property. The

idea, therefore, that any one by unwarranted interpolations or alterations could defeat such will, is certainly novel. We might, indeed, imagine a case where the mutilation or alteration of a testament was so great as to render it impossible to say what the will of testator had been, and so as evidence of such will the paper would be worthless."

In Smith *v.* Fenner, 1 Gall. 174, Mr. Justice Story said:

"Supposing that in Rhode Island, the probate of a will is not conclusive (on which I give no opinion), an erasure or alteration in it after execution does not avoid the will *in toto*. If the interlineations be made by a stranger, and the original legacy be known, it will have no legal effect, and the legacy will be still recoverable and ought to be proved as it originally stood. If made by the legatee himself at most *in odium spoliatoris*, it will only avoid the legacy so altered, but it cannot destroy other bequests in the will, either to the legatee himself or to others. This is not like the case of a contract, where the alteration of a security by the obligee himself avoids it. The legatees all take by the bounty of the testator; the object is to carry his will into effect and not merely to attend to the merits or demerits of those who claim under it. If any alteration in a will would avoid it, the executor before probate might by such alteration destroy the rights of all third persons, which would be in the highest degree unreasonable."

Where a residuary bequest was introduced into a will without the knowledge and authority of the testator, the clause containing that bequest was rejected. If so, the same principle may be applied to a single word, and, therefore, on the ruling of the House of Lords in Fulton *v.* Andrew (3 Law Rep., 7 H. & L. 448), it may be well said that the words may be struck out which had been introduced without the authority of the testator.

7 Prob. Div. Law at p. 75.

The usual course in cases of erasures made after the death of a testator is to give sentence against the erasure and then a probate be granted with the words struck out inserted therein again.

Parker *v.* Ash, 1 Vernon, 256.

An executor proved a will of personal estate wherein one of the legacies was forged: *Held*, That the executor has no remedy in equity, but should have proved the will with the special reservation as to that legacy.

Plume *v.* Beale, 1 Peere Wms. 389.

An uncle devised his estate in part to the plaintiff, &c., and disinherited his nephew and heir at law. At the funeral a brother of the heir at law snatched the will from the executor and tore it into many pieces. The pieces being gathered up and stitched together a bill was brought to establish the will, and it was decreed that the devisees should hold and enjoy against the heir.

Haines *v.* Haines, 2 Vernon, 441.

In another case a suit was brought to annul an holographic will on the ground that it was not wholly written by the deceased. The four plaintiffs, as witnesses, state the words "to" and "acres" are in a different hand. The court says: It is very manifest that the presence or absence of the two words can have no material effect upon the meaning or contents of the will. Without them the sense is the same as with them, the whole will showing that the testator bequeathed *to* his wife a certain number of *acres* of land. We cannot say that the law requires a will to be annulled for so unimportant and trivial a cause.

Heirs of McMichael *v.* Mrs. F. Bankston, widow, 24 Louisiana Annl. Rep. 451.

In a case where a copy of a paper writing alleged to have been lost was propounded for probate as the will of the deceased, Sharswood, J., said: "No doubt a will may be void in part, and otherwise valid. One bequest or devise may be good, whilst other parts may be avoided. But then it stands as a will for those parts which are good."

Ruly *v.* Ulrich, 69 Penn. St. at 183.

The court in the case of Mason *et al. v.* Poulson Adm'r, in 43 Md., p. 173, said:

"This prayer, if granted in the form asked, might well have tended to mislead the jury. The first issue, as was held by this court upon the former appeal, might in its literal reading be understood to present the question 'whether the paper was intended by Mason to operate as his last will and testament without any addition, alteration, or alterations,' which would include alterations or additions in mere matter of form not affecting its validity as a will. But it would have been an idle and useless proceeding in the orphan's court to have ordered the trial of an issue of that character, and an equally useless waste of time in the court of law to try it."

The alterations must be material to be admissible under the issues.

Mason *v.* Poulson, 40 Md., 368.
Ibid., 43 Md., 164, 167.

Date no Part of the Will.

The date is no part of the will of a testator, and if it had no date or a wrong date, the real time of its execution might be proven. (Deakins *v.* Hollis, 7 G. and J. 316.) If the will have no date or if the date be a wrong one, the will still may be a good will, and parol testimony is admis-

sible to prove the actual time of its execution. (1 Jarman on Wills, p. 27, note.)

In Wright *v.* Wright (5 Ind. 392), the court says:

"It is true the defendants gave in evidence a will bearing date March 4, 1851, but they did not rely on the will produced because it was of that date or executed on that day. Indeed the real issue in the case was whether the will was or was not valid, regardless of the time of its execution. *The date of a will is no part of the will itself. It may be held valid though it has no date or a wrong one.* If the actual time of its execution should become material that fact may be established by parol proof."

It is not material whether or not the will shows where it was made.

1 Jarman, 27, note.

Steele's Lessee *v.* Spencer, 1 Peters, 561.

THE COURT MUST DETERMINE THE MATERIALITY OF THE ALTERATIONS, AND IT IS ERROR TO SUBMIT THAT TO THE JURY.

Where it is claimed that an instrument has been altered in a material part, it is the duty of the court to decide whether the alteration is material or not, and for the jury to find whether the alteration has been made, and it is error for the court to submit both questions to the jury.

Steele's Lessee *v.* Spencer *et al.*, 1 Peters, at 561.

Where there was an apparent alteration in a power of attorney, it was held that it was for the jury to determine whether the alteration was made before or after its execution and with or without the consent of the maker.

Milliken *v.* Milliken, 66 Ill. at 20.

Mason *v.* Poulson, 43 Md. at 173.

IT WAS THE PLAIN DUTY OF THE COURT TO INSTRUCT THE JURY TO FIND ALL THE ISSUES FOR THE DEFENDANTS FOR TWO REASONS.

First. Upon all the evidence in the case, with all the influences the jury might fairly draw therefrom, it was not sufficient to justify a verdict in favor of the caveator.

Second. The evidence of the caveator was so weak, and that of the caveatees so strong, that a verdict in favor of the caveator would have been plainly unreasonable.

1. This court in Pleasants *v.* Fant, 22 Wall. 122, said:

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

In the case of Randall *v.* The Balt. & O. R.R. Co. (109 U. S. 480), Mr. Justice Gray, in delivering the opinion of the court, said:

"It is the settled law of this court that when the evidence given at the trial with all the inferences that a jury

could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. Pleasants *v.* Fant, 22 Wall. 116; Herbert *v.* Butler, 97 U. S. 319; Bowditch *v.* Boston, 101 U. S. 16; Griggs *v.* Houston, 104 U. S. 553."

See also Robertson *v.* Edelhoff, 132 U. S. 614.
Marshall *v.* Hubbard, 117 U. S. at 419.

In Hathaway *v.* E. Tenn., V. &. G. O. R.R. Co. (29 Fed. Rep. 487), said the court:

"The practice of giving peremptory instruction to the jury is a wise one. It saves time and costs. It draws clear the line which separates the province of the judge and the jury and fixes where it belongs the responsibility which should be assumed by the court."

2. In Metropolitan Railroad Company *v.* Moore (121 U. S. 570) this court, on this subject, said:

"So upon the whole evidence in the case the testimony in support of the cause of action, or of the defence, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury or to direct a verdict in a particular way; and yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. That obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence. Therefore it was said by this court in *Randall* v. *Baltimore and Ohio Railroad* (109 U. S. 478): 'It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is sufficient to support a verdict for the

plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.' In many cases, therefore, the evidence is insufficient in law, because insufficient in fact."

That the same rule prevails in the trial of issues relating to wills, we presume will not be questioned. The rule is obviously necessary to guard against sympathetic verdicts and to prevent the miscarriage of justice.

The court of appeals of Maryland found no difficulty in applying the rule in the case of Tyson *v.* Tyson (37 Md. 567). That was a case tried on issues from the orphans' court under a practice similar to our own. The issues there also involved the question of fraud and undue influence. At the trial of the issues the court, on the request of the defendants, instructed the jury that the plaintiffs had offered no evidence to warrant them in finding any of the issues in their favor, to the granting of which instruction exceptions were taken. The court of appeals, commenting on that ruling, said:

"We do not propose to review the many cases in which the question as to the legal sufficiency of evidence has been considered by this court. It is sufficient to say they all hold the rule of law to be that, whenever the evidence offered is of such a character that no rational mind could infer the fact sought to be established by it, it is the duty of the court, upon application, to instruct the jury there is no evidence before them legally sufficient to warrant their finding the fact so attempted to be proved."

The Exceptions of the Caveator.

1st. The first exception is to the preliminary proof of the will as being unsufficient, and no proof of the custody of the paper to connect it with the testator. The witness

said she was an expert; had taught writing, and was familiar with the handwriting of the testator, and knew it to be his. The paper was produced from the probate court; but the plaintiff's own witnesses fully proved the will themselves.

2d exception:

The plaintiff offered the record and proceedings of the orphans' court relating to the estate and alleged will of David McIntire. It is not stated what they contained, nor was the court informed. Counsel did not even state the purpose for which they were offered, nor what they expected to prove by them.

"A party who complains of the rejection of evidence must show that he was injured by the rejection. The bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of the 21st rule. By that rule it is ordered that when the error assigned is the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have no effect upon the verdict."

Packet Company *v.* Clough, 20 Wall. 542, 543.

Certainly the court should have been apprised of the purpose for which these records were offered, *non constat* if that had been stated the evidence might have been admitted.

It must appear upon the face of the bill that counsel made known to the court precisely what it was that was offered as evidence. As a matter of fact the court had no such information, and no intimation as to the purpose. The bill says that these records and proceedings, which were offered and rejected, "are hereby referred to and made part

of this bill of exceptions." There are no such papers attached to the bill of exceptions.

In the case of Leftwitch *v.* Lecont, 4 Wall. 189, Justice Miller says:

"If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions. There is nothing of this kind here, and as we must presume the ruling of the court to be right, in the absence of anything showing it to be wrong, the judgment must be affirmed."

But without knowing what counsel intended by this offer, it is difficult to conceive how these records could throw any light upon the question as to whether the paper writing in issue was the valid last will of David McIntire or not.

3d exception: Counsel offered in the jacket what he said were the proceedings in a certain cause in equity of Charles McIntire, Jr., and others against Edwin A. McIntire and others, the same being Equity cause No. . There was no statement of the purpose of counsel in offering these papers, nor was the court advised of what they contained. The court was left to guess at both. They are not attached to the bill of exceptions, nor copied into it. All the points urged against exception No. 2 are applicable with even more force to No. 3.

4th exception: This sets out that the plaintiff offered in evidence "the inventory of the personal estate of David McIntire, filed by Edwin A. McIntire." The object in offering it and what it was expected to prove by it are not stated, and the court is left to guess. Any lawyer would guess that it was incompetent and irrelevant. But the purpose must appear on the face of the exception or it is bad. No

copy is incorporated in the body of the exception nor attached thereto, and it is therefore subject to the same objection made to 2 and 3.

5th exception:

Emma T. McIntire was examined as a witness for the defendants. She testified that her brother, Edwin A. McIntire, brought the will to her mother's about noon on April 1, 1884 (or about two or three hours after it had been found), that she and her sister and mother read it, and that she then made a copy of it. This copy was offered in evidence by the defendants, and admitted, the court stating "that it was admitted as tending to show that the will was in the condition that she states at the time she saw the will, and made the copy, and as tending to show that at the time this witness saw it, it was not altered, if she made it at the time she says she did. There can be no doubt it was competent for the purpose for which it was asked and for which it was admitted. It could scarcely be conceived that E. A. McIntire had tampered with the will so shortly after its discovery, but at all events it was admissible for what it was worth. The propriety of admitting this paper in evidence is strongly enforced and illustrated by the significant omission of the caveator to offer in evidence the copy and memorandum Galliher swears he made of these papers when they were first taken from the box and read, on the day of the testator's death.

6th exception:

The defendant, E. A. McIntire, being under cross-examination, counsel for plaintiff asked him "if he had procured a hearse here," meaning to convey the body of the testator to the depot when the remains were taken to Philadelphia for interment. The question was permitted, and answered, "No," and the counsel for the defendants then objected to this line of examination. The court said that

it would only permit further examination in that line upon the understanding that the caveator should not be permitted to contradict what witness might say. Certainly it needs no argument or authority to sustain this ruling of the court, and it is also bad because it does not appear that any question was in fact put to which the ruling might apply.

7th exception:

The plaintiff offered in evidence the inventory filed by E. A. McIntire "for the purpose of showing in connection with the witness's written receipt then in evidence and admitted to be genuine by him, that in connection with this estate he had sworn to matters contrary to the written admissions and solely for the purpose of affecting his credit as a witness." This was objected to and the objection was sustained. The court was clearly right upon principle, as immaterial testimony could not be admitted for the purpose of discrediting the witness.

8th and 9th exceptions, p. 66:

These exceptions are to the same objections as No. 7. The attention of the court is invited to the fact that no copy of the will, in dispute, is in the record except an unauthenticated paper on page 339, which seems to have been an exhibit to an affidavit and other papers which were offered in a mass and were excluded by the court.

The exceptions from the 10th to the 20th, inclusive, are all based upon the assumption of the *materiality* of the alleged alterations of the two papers, and of the effect of the alleged tearing off of the bottom fold from one of them. Although the preponderance of the evidence was decidedly against the charge that alterations of the papers of any kind wese made after the testator's death, or that any part was torn off, yet for the purposes of this hearing it may be assumed that such changes were

made; and conceding this to be so, do they in any way affect the validity of the will? The authorities before cited leave no doubt that the alleged alterations, even if made as alleged, are perfectly harmless and immaterial, and do not, in the slightest degree, affect the integrity of the will. It would be monstrous to suppose that an executor or other custodian of a will could, for any purpose of his own, either honest or fraudulent, defeat the intention of the testator as to the disposition of his estate. But it would be a burning reproach to the law if such trivial changes as are alleged to have been made in these papers could have the effect of defeating the purposes of the testator, and turning his estate into a current where he didn't intend it should go, and where he had determined it should not, go. This will was made as it was for the intelligent and manifest purpose of cutting off his brother Charles from all participation in his estate; this was because Charles had a long time before borrowed his money and refused to repay it. David, however, was a just man, and he didn't intend the punishment to extend beyond the culprit, and hence he made Charles' only son a legatee, giving him an equal share in the residuum of his estate, after he had given to each of his nieces and his nephew, children of his other brother, Edwin T. McIntire, deceased, the amount of his loan to his brother Charles, with interest from the date of the loan,--thus emphasizing and placing beyond doubt that he made his will thus because of Charles' dishonesty in dealing with him, and he intended that he should not fail to understand it.

It is submitted that the judgment of the court below should be affirmed.

ENOCH TOTTEN,
For Defendants in Error.

APPENDIX.

Opinion of the Court in General Term in McIntire v. McIntire (19 D. C. R.; 8 Mackey's R. 482).

Mr. Justice Cox delivered the opinion of the court:

On June 8, 1884, two papers pasted together were offered for probate in the orphans' court as the last will and testament of David McIntire, recently deceased. One of them has the appearance of a formal will. It bears date, as presented, on January 7, 1890. In it the testator bequeaths to his nephews and nieces as follows: "That is to say, from July 1, 1854, to the opening of or reading of this paper, one thousand three hundred and fifty dollars sixty-four cents ($1,350.64), is to be calculated at six per cent. interest: that amount, whatever it may be is to be given to each of my brother Edwin's children. The remainder, if any, is to be equally divided between my brother Edwin's and Charles' children." I may state that at that time the remaining family of Edwin consisted of one son, Edwin A. McIntire, and four daughters, so that the effect was that five-sixths of the estate went to the children of Edwin and one sixth to Charles, Jr., the son of Charles, the brother. There was no provision for the brother Charles.

The other paper, bearing date January 1, 1880, is a disposition of some trifling matters of property therein described. It has the appearance of detached memoranda made at different times and signed by the testator in different places. He says, "at my death, or after, I wish my body to be taken to Philadelphia and deposited in the 'Macphelah Cemetery' vault, with the cover unscrewed, and remain in that condition until friends or relatives are satisfied, and then deposited in the lot with the other graves, and

provided 'Macphelah Cemetery' should be sold and a disposition made of those in the family vault, by the family, then the instruction as stated above is to follow that disposition. David McIntire, or Tire. To provide for the demise when it should come to the great proprietor of all my clothing is to go to those that they may fit. If there is more than one, a rough estimate is to be made and divided so recipients may have a word and be satisfied, nephews first. I do not leave them as a legacy; they must take them as their own. To avoid trouble, *i. e.*, not of any account whatever. To those that I appoint to settle see that those things are carried out. D. McInt. You must act understandingly; there will be no money in bank. To give satisfaction to all interested, provided that surroundings should be disturbed. That is the names that I have written down with the articles attached to them. It is my opinion that they take them as their own. David McIntire." On the margin, "If the articles are worth having." That would seem to indicate that this was really not intended as a will, but a gift *inter vivos*, without delivery. Then follows: "To Lizzie McIntire test. As she has raised more boys, hence my chest, with all my clothing or wearing apparel, coat, vest, pants, shirts, drawers, socks, etc. The large vegetable shawl, the vegetable studs, goes with the shirts. The sewing apparatus, the 5 glass-stopper vials. To Emma V., the writing desk, with all the writing apparatus, pens, ink, paper, envelopes, pencils. The cotton muffler, red silk handkerchief, and gold studs. To Charles McIntire, Jr., the telescope gun and one pocket knife, Webster's Dictionary, and pocket book. A linen pocket handkerchief to Nomy. The satchel and strap, Martha, Addyline, Emma." The appearance of the paper indicates that something here was torn off.

These papers were admitted to probate and letters of ad-

ministration with the will annexed were issued to Edwin A. McIntire, and afterwards Charles McIntire, the brother, filed a caveat against the will, and issues were framed and sent to the circuit court to be tried. The issues were, first:

(Here the issues copied in the opinion are omitted.)

I should have stated further that on the back of this will is the following: "The judges of courts lay down as a rule in law that what a person leaves in his handwriting with his name attached is his will, and it is the law. The law requires no particular formality in action or words to constitute a valid will or request. David McIntire."

The will relates only to personal property, so that the testator was right about that.

At the trial of these issues, some twenty exceptions were taken, as appears by the record, and the last one is to the general instruction of the court to the jury to find a verdict in favor of the caveatees, and it is contended that that was not a proper instruction in the light of the testimony.

The contention on the part of Charles, the brother, who is caveator, is, first: That alterations were made in these papers by Edwin A. McIntire for fraudulent purpose. The first alteration alleged was in the date of the so-called will. I call this second paper a codicil for convenience, because it has been so denominated by the parties. It is said that the original date of the will was January 1, and that was changed to January 7, and that the words "of the city of ——— " were changed into "of this city." Then it is claimed that the other paper, so-called codicil, was dated January 1, 1884, and that was changed to January 1, 1880, for the purpose of making that appear to be the prior document. It is further claimed that the second paper was mutilated, that something was torn off from the bottom; and it is contended that the jury are authorized to infer from those circumstances that it contained a revocation of the

will, and that therefore it was to the interest of Edwin A. McIntire that this, which was the later paper, should appear to be the prior one. It is claimed that this mutilation is ground on which the court and jury would be justified in inferring that that paper contained a revocation of the will. Now, as to the evidence on this question: It appears that the testator lived with his grand-niece, Mrs. Galliher, and that upon his death Edwin A. McIntire, his nephew and the uncle of Mrs. Galliher, was sent for and came to the house and the trunk or chest of the deceased was opened, out of which were taken these two papers. They were read over aloud in the presence of four parties, Edwin A. McIntire, Emma B. McIntire, sister of Mrs. Galliher, Mrs. Galliher, and her husband. Her husband made a full copy of the will and made a memorandum of the items in the other paper. At that time, Mrs. Galliher and her sister thought they were among the beneficiaries of the will; that they came under the description of nieces. The paper was then taken by Edwin A. McIntire, and afterwards filed in the orphans' court. After some time, Mrs. Galliher became apprised that she was not one of the beneficiaries under the will, and that and other circumstances led to an estrangement between her and her uncle, and it was said that she went and examined the papers in the orphans' court and found that there had been an alteration in the papers; that the paper, the so-called codicil, which was really dated the 1st day of January, 1884, had been changed to January, 1880, and, furthermore, it had contained something about the old man's spectacles or his glasses, and his gift of them to whoever wanted them, and she did not find that in the paper as it now stands. She further testified that the other paper, the will, was dated January 1, 1880, and she now finds it has been altered to January 7th. So far, her husband corroborates her; that

is, they testify to the same general effect, that the so-called codicil bore date the 1st of January, 1884, and the other, the will, January 1, 1880. Mrs. Galliher further testified that she called her uncle's attention to these alterations, and that he admitted them, and said that his only object was that the will should bear the same date with the so-called codicil, and hence the change; and that the change "of the city of" to "this city" would make this the domicile of the decedent, and would save the trouble of going to Philadelphia to take out letters on his estate. Edwin A. McIntire admits that the paper was altered from its original date, but he says that it was in that condition when it came into his possession, and that he took it from Mrs. Galliher's to his own home, and his sister testifies that he brought the paper from the Galliher's to his own house and she made a copy of it immediately, and that it then bore the same appearance that it presents now. So it appears that there is a conflict of testimony as to these alleged alterations. Now, the first thing which would strike anybody is that these alterations, if they were made, were perfectly immaterial. The change of the date of the will from January 1 to January 7 had no effect in itself at all, nor did the change of the other paper from 1884 to 1880.

The next point of contention was over the mutilation of the paper, called the codicil, by which the gift of the old man's spectacles is left out, the gift of them to whoever would take them. That is also an immaterial alteration, and it certainly could not affect the sisters of E. A. McIntire, who do not appear to have had anything to do with it, even were it agreed that the mutilation was made by E. A. McIntire.

It cannot be conceived what object was accomplished by it unless something further appears, of which I shall speak presently, and if that is all that is presented, such alleged

alterations could not be allowed to destroy the will even as far as E. A. McIntire is concerned, and certainly not so far as the bequests are made in favor of his sisters who took no part in this alteration, so far as it appears. An immaterial alteration of that sort, in our judgment, does not affect the validity of the will unless something further appears.

Now, it is claimed by the caveators that from this apparent mutilation it is fair to infer that there was a clause of revocation in that paper, and that it was the object of E. A. McIntire to get rid of it. It appears that both of these papers were opened and read in the presence of four persons, Mrs. Galliher, her husband and sister, and E. A. McIntire. Now, Mrs. Galliher and her sister supposed that they were beneficiaries under the will, and if there had been anything about a revocation in that part of the will said to have been torn off, certainly they would not have overlooked it. The husband of Mrs. Galliher took a memorandum of the items, and both of them were on the stand. They were not asked if the part torn was a clause of revocation, and they did not testify that there was anything of the sort in the papers. The husband did not even produce the memorandum which he took and which is to be supposed to be in his possession. As they are absolutely silent on the subject of a revocation, it is equivalent to testimony that no such clause of revocation existed, and really the jury was asked to infer the existence of a clause of revocation only from the circumstance that there is a mutilation of the paper, almost in the face, I might say, of testimony that there was no such clause. The only thing that was testified to as having been stated in that paper which is not now in it, was the mere disposition of the old man's glasses to whoever might want them.

If the jury had found against the will on that evidence, it seems to me that it would have been the duty of the

court to set the verdict aside. Three witnesses, who take special pains to show how all the contents of these papers were impressed upon their memories, said that there was something in the so-called codicil about the testator's glasses that they did not find after it had been filed in the probate court, but they do not intimate that there was a single word in it about the revocation of the will. The fact that they do not, it seems to us, is equivalent almost to saying that there was no such revocation, and yet the court were asked to authorize the jury to infer such revocation in the face of this proof by the caveator.

Now, we say that we think the judge was perfectly right in instructing the jury to find for the caveatees on issue No. 6: "Has the said paper writing purporting to be the said last will and testament of the said David McIntire, deceased, probated on the 8th day of April, 1884, or any part thereof, been fraudulently altered since the death of said David McIntire and before the probate thereof, by any person or persons to the prejudice of any of the next of kin or heirs at law of said David McIntire?" We cannot conceive that any fraud can be predicated of the alterations that were made, as they are entirely immaterial. Such being our opinion, it disposes also of the last issue, "has the said instrument purporting to be the last will and testament of said David McIntire, deceased, or any part thereof, been revoked?"

Now, as to the other issues: First. "Was the paper writing as now probated and now bearing date January 7, 1880, purporting to be the last will and testament of said David McIntire, deceased, executed by said David McIntire in due form as required by law?" That refers simply to the question of handwriting. It may be said that there is some evidence in the case against the theory that it was in the handwriting of David McIntire, though a majority of the

witnesses testify that the will, as it is called, was in his handwriting. The witnesses on both sides agree that the other paper was in his handwriting. The caveator alone says that he does not think the will is *from the general look of it*. Of course he is interested in the matter. He admits that the other paper is in his brother's handwriting, but no witness professes to see any difference in the handwriting of the two papers. If there is any evidence at all that it is not in David's handwriting, it is so trivial that it would not justify a court in ordering a new trial on this issue.

As to the second issue, there was no question made at all.

The third issue was, "Were the contents of said paper writing," etc., known to the testator? There is no question about that, because it was in his handwriting and found in his trunk.

"Was the said paper writing," etc., executed under undue influence? There is no controversy over that.

"Is the said paper writing as now probated and now bearing date January 7, 1880, the complete and final last will and testament of the said David McIntire?" We think that there was no error in the court's ruling on that issue, and that it was properly found.

As to the 7th issue, it may be said that there is evidence tending to show that E. A. McIntire did alter the paper—that is to say, by changing it to a different date, which it now bears, and that it went through his hands with one date and came out of his hands with the present date.

Perhaps that is true, and perhaps it is not the proper thing to do, yet the court instructed the jury to find there was no alteration. But if there was an alteration, we conceive that it was so trivial that it could not affect the paper or the result, and therefore no harm could be done by the supposed error in this instruction, and it furnishes no ground for a new trial. That covers all the issues.

There are nine other bills of exceptions that we do not propose to examine. We have gone over them very carefully. A great deal of evidence was offered tending to show misconduct on the part of E. A. McIntire; that he failed to notify his Uncle Charles in due time of the death of his Uncle David, so that he could come on here, and that he did not wish him to come, and misled him as to the condition of the estate; that after the will was probated he filed false inventories, etc., omitting to charge himself with moneys received by him, etc. Some of the evidence was admitted and some excluded. We have gone over the exceptions very carefully, and in the light of the views that we have expressed, we do not find any substantial error in the rulings that are excepted to; *and therefore the motion for a new trial must be overruled.*